

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: EQUIFAX, INC. DATA SECURITY) Case No. 1:17-MD-2800-TWT
BREACH LITIGATION)
) December 14, 2018
) 9:34 a.m.
) Atlanta, Georgia

TRANSCRIPT OF THE MOTION HEARING
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL:

On behalf of the Plaintiffs:

Roy Barnes, Esq.
Kenneth Canfield, Esq.
Joseph Guglielmo, Esq.
Amy Keller, Esq.
Gary Lynch, Esq.
Norman Siegel, Esq.

On behalf of the Defendant:

David Balser, Esq.
Stewart Haskins, Esq.
Phyllis Sumner, Esq.

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

SUSAN C. BAKER, RMR, CRR
OFFICIAL COURT REPORTER
2110 FIRST STREET, SUITE 2-194
FORT MYERS, FL 33901
(239) 461-2064

1 (Proceedings held December 14, 2018, Atlanta,
2 Georgia, 9:34 a.m., in open court.)

3 THE COURT: All right. This is the case of In Re:
4 Equifax Data Security Breach Litigation, Case Number
5 17-MD-2800.

6 First let me ask counsel for the parties who
7 anticipate participating in the argument today to introduce
8 yourself and the parties you represent.

9 MR. CANFIELD: Good morning, Your Honor. Ken
10 Canfield, co-lead counsel for the consumer Plaintiffs.

11 THE COURT: Morning, Mr. Canfield.

12 MS. KELLER: Morning, Your Honor. Amy Keller, also
13 co-lead counsel for the consumer Plaintiffs.

14 THE COURT: Morning, Ms. Keller.

15 MR. SIEGEL: And Norman Siegel, co-lead counsel for
16 the consumer Plaintiffs. Good morning.

17 THE COURT: Good morning, Mr. Siegel.

18 MR. BARNES: Roy Barnes for the consumer Plaintiffs.

19 THE COURT: Mr. Barnes.

20 MR. GUGLIELMO: Morning, Your Honor. Joseph
21 Guglielmo on behalf of the financial institution Plaintiffs. I
22 am here with my colleague, Gary Lynch.

23 THE COURT: Good morning, gentlemen.

24 MR. BALSER: Morning, Your Honor. David Balser, King
25 & Spalding, on behalf of the Equifax Defendants.

1 THE COURT: Mr. Balser.

2 MS. SUMNER: Good morning, Your Honor. Phyllis
3 Sumner on behalf of the Equifax Defendants.

4 THE COURT: Morning, Ms. Sumner.

5 MR. HASKINS: Morning, Your Honor. Stewart Haskins
6 on behalf of Equifax as well.

7 THE COURT: Morning, Mr. Haskins.

8 All right. I think I said I was going to give one
9 hour per side for the consumer Plaintiffs' case, one hour per
10 side for the financial institutions and 30 minutes per side for
11 the small business Plaintiffs.

12 Everybody understand that?

13 MR. SIEGEL: Yes, Your Honor.

14 MR. BALSER: Yes.

15 THE COURT: All right. This is a hearing on the
16 Defendant's motions to dismiss in this case.

17 Mr. Balser, what's your plan here?

18 MR. BALSER: Good morning, Your Honor.

19 Plan is that we would start if it suits Your Honor
20 with the motion to dismiss in the consumer class action. I'll
21 be arguing on behalf of Equifax in that motion. We would then
22 turn to the small business motions to dismiss which Mr. Haskins
23 would handle and then proceed to the financial institutions'
24 motion to dismiss which Ms. Sumner will handle.

25 Is that acceptable to Your Honor?

1 THE COURT: That's fine.

2 So I'll hear from you, and then I'll hear from the
3 Plaintiffs on the consumer case.

4 MR. BALSER: Correct. And then any short rebuttal
5 that might be necessary.

6 THE COURT: Fine.

7 MR. BALSER: To correct my friend, Mr. Canfield.

8 THE COURT: I'm sure much correction will be
9 necessary.

10 MR. BALSER: Your Honor, before I get into the
11 details of the argument, I wanted to frame the issues up as we
12 see them from a big-picture perspective. In 2017, Equifax,
13 like many of our nation's corporations, was the victim of a
14 criminal hacking. This was a highly publicized data breach
15 that involved the theft of certain information of over 145
16 million people.

17 Importantly for this case, and a fact not always
18 reported by the press accounts of the case, the criminals stole
19 the data from Equifax, Inc. and not from Equifax Information
20 Systems. That's an important point here for this case because
21 Equifax, Inc. is not a credit reporting agency, and the
22 information taken did not include any consumer credit files.

23 As a result of the widespread and frequent hacking of
24 which U.S. corporations are falling victim, there are ongoing
25 policy debates about how best to address these issues. And

1 it's important to emphasize that these are to a large extent
2 policy debates. And, of course, it's not the role of the
3 courts but the role of legislature to decide policy.

4 Consumer fraud statutes, statutes governing credit
5 reporting agencies and traditional tort theories are not
6 designed to address the complex issues raised by data breach
7 cases. And this is so because, unlike a typical case,
8 Defendants in these data breach cases are victims of crimes, as
9 are the Plaintiffs. And in many of these cases, the Plaintiffs
10 have no tangible injury that they can point to. And,
11 respectfully, that is the case here.

12 So we're here today to focus on the law, primarily
13 Georgia law, and Georgia law as it now stands. We're not here
14 to focus on issues of policy. And as I'm going to discuss in
15 detail, and as my colleagues will also point out in their
16 arguments, the data breach claims that the Plaintiffs assert
17 here do not fit within the statutes and the traditional tort
18 theories that they rely upon.

19 So with that overview, I'd like to just turn to the
20 allegations in the case with a short background of what brings
21 us here today. As I mentioned, 2017 criminal hackers accessed
22 Equifax, Inc.'s system through a web portal. Immediately upon
23 discovering that hack, Equifax took quick action to stop the
24 intruders and add additional defenses and immediately hired a
25 cybersecurity firm Mandiant to assist with the forensic review.

1 Equifax diligently investigated and reported to the
2 public and relevant stakeholders what it had found. It
3 investigated the scope of the breach. It identified
4 substantially all of the affected consumers. It set up a
5 dedicated website and call center to answer consumers'
6 questions. It promptly announced the breach both in the
7 national press and in written notifications to state and
8 federal regulatory bodies and mailed notifications to consumers
9 whose payment card information or dispute documents had been
10 accessed.

11 Equifax went further than just that. Equifax then
12 offered an unprecedented protection package. And when I say
13 unprecedented, it truly is unprecedented what Equifax did in
14 the wake of this data breach.

15 First thing that Equifax did is offered a robust
16 package of credit monitoring and identity theft protection
17 services free of charge to all consumers in the United States,
18 whether or not their personal identifying information had been
19 stolen in the breach. And among the features of what Equifax
20 offered for free to the public was three-bureau credit
21 monitoring, free Equifax credit reports, identity theft
22 insurance and internet scanning for Social Security numbers.
23 Millions of consumers signed up and registered for these
24 services.

25 And then on top of that, in January of this year

1 Equifax rolled out a free service allowing U.S. consumers to
2 lock and unlock their Equifax credit reports. And that can be
3 done from an app on your phone. You can download the app, and
4 you can control from the app on your phone when and how to
5 unlock your own credit files at Equifax.

6 So, of course, we're here today because in the wake
7 of the breach, as in every breach, class actions are
8 immediately filed. In fact, the first class action was filed
9 the day that the breach was announced. The Judicial Panel for
10 Multidistrict Litigation consolidated these cases in front of
11 Your Honor which led to the filing of a 556-page consolidated
12 consumer class action complaint asserting 99 claims for relief
13 on behalf of a putative nationwide class and numerous
14 subclasses. And we've moved to dismiss that complaint in its
15 entirety. That motion is fully briefed, and that's what brings
16 us here today.

17 It's important as Your Honor goes through this
18 complaint and analyzes our motion to point out that the claims
19 here are brought by 96 different individual consumers from 50
20 different states alleging different claims and different
21 purported harms. This is not the typical class action where
22 you have one or two named Plaintiffs who assert essentially the
23 same claims. These are really 96 different Plaintiffs all
24 consolidated together in one complaint that have very, very
25 different claims, including very different claims of purported

1 injury. And it would take many, many, many hours to parse
2 through all of the variances that exist with respect to these
3 claims. We've tried to do this at a very, very high level.

4 Just to orient Your Honor to this, this is an
5 eye-killer. This is a spider chart that we put together. On
6 the outside here are each of the 96 Plaintiffs in the case.
7 And what we've done on the right is to try to put in buckets
8 the types of harm that these 96 different Plaintiffs have
9 alleged and to show Your Honor graphically how different some
10 of these claims are.

11 For example, 16 of the Plaintiffs have alleged
12 pre-breach payments for credit monitoring or similar services.
13 So these are people who signed up for credit monitoring and
14 allege that as a result of their buying credit monitoring
15 service somehow we breached their contracts as a result of the
16 data breach that occurred.

17 There are 52 different Plaintiffs who have made
18 claims for post-breach mitigation expenses. There are 89
19 Plaintiffs who seek reimbursement for time and effort resulting
20 from the aftermath of the breach. There are 39 Plaintiffs who
21 have alleged identity theft. And all -- there are three who
22 have alleged payment card fraud, although none of those three
23 alleges that they were not reimbursed for whatever fraud
24 occurred on the credit cards. And all 96 of the Plaintiffs
25 have alleged they have been harmed simply by the compromise of

1 their PII and the risk of future harm.

2 So that's what we're dealing with. So when you parse
3 through these claims and you analyze the sufficiency of the
4 complaint, it really is a very difficult task unfortunately
5 because you have to look at all these different, disparate
6 allegations that are being made by each of the different
7 Plaintiffs.

8 I want to spend just a minute on who the Defendants
9 are because, as I said at the outset, this is important.
10 Equifax, Inc. is named. Equifax is a leading global provider
11 of information, human resources and data analytics services for
12 businesses, governments and consumers. It is not a credit
13 reporting agency.

14 Equifax, Inc. has two subsidiaries which were named
15 in the lawsuit, Equifax Information Services which is a
16 national consumer reporting agency that stores and furnishes
17 consumer reporting data, and then Equifax Consumer Services
18 which offers certain services to consumers like the credit
19 monitoring product that we've been sued on. It's very
20 important to note that it is the information stored on Equifax,
21 Inc.'s servers that was accessed in the breach. Information
22 from Equifax Information Services was not accessed during the
23 data breach, and that is not contested.

24 Here's what I want to do, Your Honor. This is just a
25 roadmap of where I'm going to go in the next 45 minutes or so.

1 I want to start with Plaintiffs' FCRA claims. I want to then
2 talk generally about those allegations of harm that I outline
3 on that spider chart. I want to spend some time on their
4 negligence claims. I want to touch on the negligence per se
5 claims, the GFBPA claim, the unjust enrichment claim, the
6 contract claims, the uniform deceptive acts and practices
7 claims brought under other states' statutes and finish up with
8 the data breach notification claims and explain why in our view
9 none of these allegations and none of these claims states a
10 claim under Rule 12.

11 Let's start with the FCRA claims. Plaintiffs'
12 primary FCRA claim -- and this is the Fair Credit Reporting
13 Act -- is under Section 1681(b) of that statute. What 1681(b)
14 of the FCRA says is that any consumer reporting agency may
15 furnish a consumer report under the following circumstances and
16 no other, and then it lists the circumstances in which a CRA
17 like Equifax Information Services is permitted to release a
18 credit report or credit information and credit file respecting
19 the consumer.

20 So what's Plaintiffs' theory here?

21 Plaintiffs' theory is that by virtue of the theft by
22 a criminal of information at one level up at Equifax, Inc. that
23 Equifax furnished consumer data to the thieves and, therefore,
24 violated Section 1681(b). But it's very clear that Section
25 1681(b) renders a CRA liable only if it furnishes a consumer

1 report to a third party.

2 That didn't happen here. There was no furnishing,
3 and there was no consumer report. Therefore, there is no
4 claim.

5 So let's take those one at a time. Let's start with
6 the furnishing claim.

7 This is not the first time Plaintiffs in a data
8 breach case have alleged -- a data breach case involving a CRA
9 have alleged that based on negligence of the CRA or such gross
10 negligence that the theft of the information was essentially
11 tantamount to a furnishing of information, but every single
12 court that has addressed that argument has rejected it out of
13 hand. Courts have unanimously held that the term "furnishing"
14 requires that a CRA intentionally disclose information and that
15 information stolen from a CRA is not information that the CRA
16 furnished.

17 And we've cited the *Galaria v. Nationwide Mutual* case
18 in our papers, the *Experian Data Breach* case which held that
19 stolen data was not furnished and the *Combined Insurance*
20 *Company of America* case which collects a number of other cases
21 that so hold. Importantly, Plaintiffs cite no cases that hold
22 otherwise.

23 So that really ends the inquiry on the FCRA claim. I
24 mean, it is -- the Court would have to break with every other
25 court and ignore purposes of the statute and clear language of

1 1681(b) to find that the victim of a criminal hack is
2 furnishing information voluntarily to the criminal, and that's
3 what they're asking you to do.

4 Secondly, even if the Court could get over that
5 hurdle -- and, respectfully, we don't think you should even try
6 -- the stolen information here is not a consumer report under
7 the FCRA such as to support a 1681(b) claim. The stolen PII
8 here largely consists of names, birth dates, Social Security
9 numbers, addresses, phone numbers and driver's license numbers
10 which courts refer to as header information. None of that
11 information is a consumer report because none of it bears on
12 consumers' creditworthiness, character or motive of living.
13 And we have cited not only the statute but the *Network* case and
14 other cases in our motion at page 14 that make clear that
15 header information is not a consumer report for purposes of
16 1681(b).

17 Plaintiffs also assert a claim -- certain Plaintiffs
18 assert a claim under 1681(e) of the FCRA which requires that
19 every consumer reporting agency shall maintain reasonable
20 procedures designed to limit the furnishing of consumer reports
21 to the purposes listed under Section 1681(b) of this title.
22 And, not surprisingly, courts have held that in order for a
23 Plaintiff to bring a 1681(e) claim they must first show that
24 the reporting agency released a report in violation of 1681(b).

25 And for the reasons I explained a minute ago, that is

1 that there was no furnishing and the information taken wasn't a
2 consumer report, Plaintiffs cannot establish the underlying
3 requisite showing under 1681(b) to support a 1681(e) claim.
4 And Plaintiffs do not contend otherwise. That is, they don't
5 contend that if we prevail on the 1681(b) claim that there is
6 no 1681(e) claim. That is a prerequisite to recovering under
7 1681(e) that we've furnished a consumer report which did not
8 happen here.

9 Two of the Plaintiffs, two of the 96, have alleged
10 claims under 1681(g). That is a provision that requires CRAs
11 upon request to clearly and accurately disclose to the consumer
12 all information in the consumer's file at the time of the
13 request, including identifying each person that procured a
14 consumer report by name, address and phone number. So the
15 purpose of this statutory provision is if, say, Macy's makes a
16 credit inquiry on my credit file and I ask the CRA to disclose
17 who has pulled my credit, they have to tell me name, address,
18 phone number of the Macy's outlet that pulled my credit.

19 Here the allegation is that we violated 1681(g)
20 because we didn't tell consumers who asked who the identity of
21 hackers were that took their information. Of course, we don't
22 know who the identity of the hackers are; so we can't comply
23 with their tortured reading of the statute.

24 Criminals here did not procure a consumer report. We
25 can't be required to identify criminal hackers we don't know

1 the identity of. It kind of illustrates the absurdity of the
2 argument. Essentially, they are arguing from an impossible
3 interpretation of the statute. It just doesn't make any sense.
4 I mean, that's clearly not the purpose.

5 And so this is kind of a -- I mean, to say these are
6 strained arguments would, I think, be charitable. And I think
7 we should ask ourselves why they brought these claims, why did
8 they throw these into the complaint.

9 The reason that they did is that the FCRA carries
10 with it statutory penalties, and the statutory penalties range
11 from \$100 to \$1,000 per violation. There are 145 million
12 putative class members here. So if Your Honor were to break
13 with every other court that has addressed this issue and permit
14 the FCRA claims to remain in this complaint, they would have a
15 claim that would be between 14-and-a-half billion and 145
16 billion dollars against Equifax without having to show any harm
17 or injury, alleged sufficient injury as they have to do under
18 other statutes in tort theories to support the claim. So it's
19 a Hail Mary, and the Court should reject it out of hand.

20 That leads us to the allegations of harm that they do
21 make which are insufficient, and I think it does explain why
22 they would love to avail themselves of the statutory penalties
23 because they have a very difficult time alleging cognizable
24 harm for many of the Plaintiffs. I'm not going to go through
25 all of the deficiencies in the allegations of harm, but I want

1 to highlight four of them.

2 All the Plaintiffs' tort claims, including their
3 claims for negligence and violation of consumer protection
4 statutes, require a showing of injury. The injuries that
5 Plaintiffs alleged here for the most part, and the ones I'll
6 touch on, are not legally cognizable harms under Georgia law.
7 As I mentioned at the outset, the Plaintiffs here are not
8 fungible. The Court has to look at each individual's
9 allegations of harm in each of their claims, or really more
10 accurately here each individual's failure to allege the
11 requisite harm, to make a showing of a claim under Georgia law.

12 The four different kinds of harm that I want to focus
13 on that are alleged throughout many of the individuals' claims
14 here are injuries that they claim arise from the mere
15 compromise of the PII, unspecified future harms, mitigation of
16 future harms and nominal damages. None of those theories
17 supports a claim under the tort theories they allege under
18 Georgia law.

19 Georgia courts have consistently held that the
20 compromise of personally identifying information standing alone
21 is not an injury sufficient to support a tort claim. We have
22 cited the *Finnerty* case, the *Rite Aid* case and the *Collins* case
23 for that proposition.

24 Georgia law similarly does not permit recovery based
25 on the fear of future harm. In *Finnerty*, the Court of Appeals

1 said a fear of future damages there from the misuse of personal
2 information is too speculative to form the basis of recovery.
3 And courts around the country have recognized that mitigating
4 future harms is not sufficient injury unless the harm is
5 imminent. And the Georgia Court of Appeals in the *Collins* case
6 recently agreed saying that, "Prophylactic measures such as
7 credit monitoring and identity theft protection and their
8 associated costs, which are designed to ward off exposure to
9 future speculative harm, are insufficient to state a cognizable
10 claim under Georgia law."

11 And here I think it's important to note that
12 immediately, as I pointed out from the beginning, immediately
13 we offered and provided to every citizen in the United States
14 free credit monitoring, free identity theft protection so that
15 Plaintiffs -- so consumers would not have to spend to mitigate.
16 But even if they had gone -- and some allege they did go out
17 and buy their own credit monitoring or identity theft
18 protection -- the law is clear that unless harm is imminent
19 those are normal mitigating steps that reasonable people should
20 take, and they are not damages that are caused and compensable
21 resulting from the breach.

22 This rule, this rule that mitigation injuries are not
23 cognizable, applies equally to time and effort and monetary
24 expenditures. The majority of courts -- in the *Wendy's* case
25 that we cited the court said that the majority of courts in

1 data breach cases have held that the cost to mitigate, the risk
2 of future harm does not constitute an injury unless the future
3 harm being mitigated against is itself imminent.

4 And the complaint here, Your Honor, you can read all
5 565 pages. I don't recommend it, you know, unless you're
6 sleepy but -- or you want to go to sleep. But the complaint is
7 devoid of facts suggesting that any future harm is imminent or
8 even likely. For example, there's no allegation, nor really
9 could there be, of facts showing that the criminal hackers
10 intend to use Plaintiffs' personally identifying information to
11 commit more crimes.

12 It's interesting that, you know, we're now over a
13 year in and the grave harm that folks were concerned about, and
14 rightfully so, has not fallen or hasn't -- there's no evidence
15 that there's been some huge dump of -- or sale or effort by the
16 criminal hackers here to misuse the Plaintiffs' information.
17 And there is no allegation in the complaint that any such harm
18 is imminent. Therefore, Plaintiffs can't rely on time and
19 money spent mitigating those theoretical future harms as an
20 injury.

21 And they've come up with a new theory that at a
22 minimum they are entitled to nominal damages, but Plaintiffs
23 have to establish an injury even to secure nominal damages.
24 They can't use nominal damages as a substitute for showing an
25 actual injury. There's a good quote here from *Rite Aid* that I

1 think actually quotes *Palsgraf* that says "Proof of negligence
2 in the air, so to speak, will not do." There's got to be an
3 injury that's tied causally to the breach. So for those
4 reasons, just from an overarching perspective when you look
5 across your tort claims or statutory claims or common law
6 claims, there are many, many of these Plaintiffs' claims are
7 insufficient as a matter of law just based on their failure to
8 allege cognizable injury required by Georgia law.

9 Where I want to spend a few minutes now, Your Honor,
10 is on the negligence claim. And I think this is a very -- you
11 know, this is a very interesting place we find ourselves with
12 the negligence claim given the recent Court of Appeals decision
13 in the *McConnell* case. And I do want to walk through in some
14 detail both Your Honor's holding in *Home Depot* and how
15 *McConnell* lines up against that and our view of what the case
16 law is and isn't now on negligence claims in Georgia.

17 There's no dispute that Georgia common law governs
18 the negligence claim. The Plaintiffs agree with us on that.
19 We recognize that in *Home Depot* Your Honor found a duty to
20 safeguard personal information exists. What the Court said --
21 what you said in your *Home Depot* opinion was that Georgia law
22 imposes a duty to take reasonable steps to avoid foreseeable
23 harms caused by third-party criminal acts. And Your Honor
24 relied on the *Bradley Center v. Wessner* case in support of that
25 holding. And I am going to -- I do want to talk about the

1 *Wessner* case in some detail in a minute.

2 Now, of course, Your Honor did not have the benefit
3 of the Court of Appeals' decision in *McConnell III* when *Home*
4 *Depot* was decided. And I think it's fair to say that Your
5 Honor sitting as essentially a state court judge under eerie --
6 in *Home Depot* was making an eerie prediction as to what Georgia
7 law would be, and I understand why the Court ruled the way it
8 did. But we now some years later have a definitive statement
9 from the Georgia Court of Appeals as to what the law in Georgia
10 is on negligence in the data breach context which the Court did
11 not have the benefit of when *Home Depot* was decided.

12 And *McConnell III* which was just issued this year
13 held that Georgia law does not recognize the legal duty to
14 safeguard personal information. What the *McConnell* court said,
15 and I quote, "A duty of care to safeguard personal information
16 has no source in Georgia statutory or case law." And a
17 negligence claim based on such duty did not survive a motion to
18 dismiss in that case. And *McConnell* we contend is fully in
19 line with an unbroken string of authority in Georgia that the
20 *McConnell* case relied on, including the *Jenkins* case and the
21 *Cleveland* case. The Georgia Supreme Court has held that a
22 court should not create a new duty absent a statutory
23 pronouncement or longstanding case law, and *McConnell III*
24 correctly recognized that there is no statute or longstanding
25 case law that supports imposing a duty to safeguard personal

1 information here.

2 So clearly *McConnell III* is at odds with *Home Depot*.
3 So what do the Plaintiffs do? What do they say?

4 Well, they point back to Your Honor's decision in
5 *Wessner*. And what the Court -- what you said in *Home Depot*
6 relying on *Wessner* was that Georgia law recognizes a general
7 duty to all the world not to subject them to an unreasonable
8 risk of harm.

9 But I want to take a minute and talk about the
10 *Wessner* case. *Wessner* was a case in which Mr. *Wessner* and
11 Ms. *Wessner* who were married were having marital problems, and
12 apparently the reason they were having marital problems is that
13 Ms. *Wessner* was having an affair. Mr. *Wessner* checked himself
14 into the Bradley Center which is a hospital for people with
15 mental issues. And after the first time he was discharged, he
16 attempted to commit suicide. Two weeks later he voluntarily
17 checked himself back into the Bradley Center.

18 And the facts in *Bradley* indicate that as a condition
19 of his voluntary submission to the Bradley Center he,
20 Mr. *Wessner*, submitted himself to the control of the treating
21 physician and the hospital. That is, the hospital had control
22 over whether Mr. *Wessner* could leave the facility and under
23 what circumstances.

24 While he was there the second time, he made
25 statements to members of the staff that he intended to cause

1 harm to his wife. Notwithstanding the fact that he had told
2 them that he intended to harm his wife, the treating physician
3 who had control over Mr. *Wessner* and the hospital gave him a
4 weekend pass, two-day pass without any conditions. He promptly
5 went and got his gun, found his wife and her boyfriend and shot
6 them both and killed them.

7 A wrongful death suit was brought by Ms. *Wessner's*
8 son against the Bradley Center alleging that because the
9 Bradley Center had control over Mr. *Wessner*, knew that he
10 intended to cause harm and was dangerous to his wife, yet
11 nevertheless permitted him out of -- to escape their control
12 and get a weekend pass, they were responsible for the death.
13 The defense in that case was this is really a medical
14 malpractice case, and you can't extend the duty of a doctor or
15 hospital beyond the relationship with a patient.

16 And the Supreme Court when it looked at the case said
17 that this is not a malpractice case. This is a case that can
18 be analogized to cases under the restatement where when a
19 person has control and responsibility for a third party, knows
20 that third party's dangerous, yet unleashes them, they have a
21 duty to take steps to mitigate and try to prevent the harm.

22 That's what happened in *Wessner*. And some of the
23 language in *Wessner*, I think, is particularly instructive. The
24 Supreme Court in that case said that -- I was reading this last
25 night and was struck by the language. What the court said is

1 -- and it was in response to the argument that Bradley Center
2 made that this is really a malpractice case that the language
3 that Your Honor picked up on and relied on in the *Home Depot*
4 case came from.

5 What they said is that -- and I'm quoting here --
6 "The legal duty in this case did not arise out of this
7 consensual transaction between doctor and patient, however, so
8 there is no basis for requirement of privity. The legal duty
9 in this case arises out of the general duty one owes to all the
10 world not to subject them to an unreasonable risk of harm.
11 This has been expressed as follows. Negligence is conduct
12 which falls below the standard established by law for
13 protection of others."

14 They went on to say, next paragraph, "We believe the
15 Court of Appeals properly identified the legal duty in this
16 case in that 'where the course of treatment of a mental patient
17 involves an exercise of control over him by a physician who
18 knows or should know that the patient is likely to cause bodily
19 harm to others, an independent duty arises from that
20 relationship and falls upon that decision to exercise that
21 control with such reasonable care as to prevent harm to
22 others.'"

23 It went on to say, "We agree with appellant," which
24 is Bradley Center, "that as a general rule there is no duty to
25 control the conduct of third persons to prevent them from

1 causing physical harm to others. We find, however, that one of
2 the exceptions to that rule applies here because of the special
3 relationship which existed between appellant and appellee's
4 father. One who takes charge of a third person whom he knows
5 or should know to be likely to cause bodily harm to others if
6 not controlled is under a duty to exercise reasonable care to
7 control the third person to prevent him from doing such harm."

8 That is the *Wessner* case. And since *Wessner* has been
9 decided, both the Court of Appeals and the Supreme Court have
10 limited *Wessner* to its facts and apply that case only where the
11 Defendant exercised control over the person that caused the
12 harm. Equifax here, of course, did not exercise any control
13 over the criminal hackers who infiltrated its systems, nor do
14 the Plaintiffs allege that we controlled them.

15 So *Wessner* as the fountainhead of the decision in
16 *Home Depot*, I think, especially in light of the *McConnell*
17 decision bears another look. And I think it is not -- it
18 doesn't stand for the proposition that Plaintiffs have argued
19 that it does, and I think a careful reading of that case and
20 the cases that have cabined it which we point out in our
21 opening brief at pages 30, 31 and Footnote 8 are worth looking
22 at.

23 So the next point I would make is, of course,
24 *McConnell*, the *McConnell* court had the benefit of *Wessner* and
25 still had -- it still held that there's no duty to safeguard

1 personally identifiable information. Plaintiffs try to
2 distinguish *McConnell* and try to reconcile it with *Home Depot*
3 by arguing that the data breach in *McConnell* was not
4 foreseeable. And they contend that *McConnell III* stands only
5 for the limited proposition that there's no duty in the context
6 of an unforeseeable data breach. That's how they tried to
7 parse it.

8 And you'll see in Mr. Canfield's slide, one of his
9 slides -- I think one of the benefits of getting these early is
10 we have a chance to look at them -- you're going to see a quote
11 on this foreseeability issue that the Plaintiffs rely on. And
12 they did this in their response brief. But that quote that
13 he's going to show you comes from *McConnell I* which has been
14 superseded by *McConnell III*. And the language that he points
15 to in the slide deck is not in the *McConnell III* decision.

16 Now, we don't know why the Georgia Court of Appeals
17 decided to excise the argument on foreseeability that the
18 Plaintiffs are going to rely on. It might be, and I suggest it
19 very well could be, that they went back and looked at the
20 actual complaint that was filed in *McConnell* which we have
21 attached as an exhibit to our reply brief which shows that, in
22 fact, the *McConnell* Plaintiffs did allege foreseeability.

23 In paragraphs 26 and 27, *McConnell* alleged that it
24 was reasonably foreseeable that Defendant's failure to
25 safeguard and protect Plaintiffs' and the other class members'

1 personal information would result in unauthorized third parties
2 gaining access to Plaintiffs' and the other class members'
3 personal information. And the Court of Appeals, of course, on
4 a motion to dismiss was required to accept those allegations
5 for purposes of the appeal. So based on the language in the
6 complaint that they had before them, *McConnell III* cannot
7 properly be limited to just unforeseeable data breaches and
8 that is not a valid basis upon which to distinguish *McConnell*.

9 Now, as the Court knows, as we've pointed out,
10 *McConnell III* has been accepted for certiorari by the Georgia
11 Supreme Court. But absent persuasive evidence the Georgia
12 Supreme Court would rule otherwise, this Court is bound to
13 follow the Georgia Court of Appeals' decision. And even in the
14 face of the grant of cert, the Georgia Court of Appeals has
15 held that their own decisions remain binding precedent until
16 such time as they are modified or reversed by our Supreme
17 Court.

18 So we respectfully contend, Your Honor, that based on
19 the law as it now stands in Georgia Plaintiffs' negligence
20 claim fails as a matter of law and it ought to be dismissed.
21 At a minimum, I would say to Your Honor that you should wait to
22 see what the Georgia Supreme Court does with the *McConnell*
23 case. We may get further clarity. We may not. But we know
24 that cert is being granted. And I think given the uncertainty
25 in the law and the conflict between Your Honor's decision and

1 Judge Totenberg's decision in *Arby's* and what Judge Ellington
2 has ruled in the *McConnell* case, he wrote the opinion that at a
3 minimum the Court ought to wait.

4 And, of course, I'm glad Governor Barnes is here
5 because I think we all know Judge Ellington and he's an
6 esteemed jurist who Governor Barnes appointed to the Court of
7 Appeals in 1999. He's an astute judge of judicial acumen. And
8 I think if you read Judge -- if you read Judge Ellington's
9 opinion, it is a very well crafted and persuasive opinion.

10 So where do the Plaintiffs fall back?

11 They fall back to policy. And --

12 THE COURT: So did the Georgia Supreme Court identify
13 the issue that they were going to consider because there's a
14 sovereign immunity issue in there and the negligence issue?
15 Did they say which --

16 MR. BALSER: They did. They asked for briefing on
17 both issues.

18 THE COURT: Both?

19 MR. BALSER: So it could go a lot of different ways,
20 right? And we just don't know what they're going to do. I
21 mean, it's possible that they could dispose of -- they could
22 say that Court of Appeals got it wrong on sovereign immunity
23 and not reach the data breach question.

24 THE COURT: And there we are. We're no better off.

25 MR. BALSER: Right.

1 Or they could take it on. They could take both
2 issues on and say, Judge, now Justice, soon to be Justice
3 Ellington was right. And absent a legislative -- clear
4 legislative pronouncement there is no -- we just don't know
5 what they're going to do. But as the law stands right now,
6 *McConnell III* is binding, and it's clear. And I understand it
7 may be unpalatable to some, but it is the law in Georgia as it
8 stands today.

9 There is one other point I would make about policy,
10 and it does go back to Judge Ellington's opinion. Of course,
11 we cited the *Frye* case that says -- and it's axiomatic; and, of
12 course, the Court knows that it's the duty of the General
13 Assembly, not the Court's, to enact policy into law. But in
14 the *McConnell III* case, Judge Ellington had a discussion --
15 after parsing through all the arguments and looking -- you
16 know, canvassing law in Georgia, looking for a potential duty
17 somewhere to safeguard PII and finding none, Judge Ellington
18 made the following observation.

19 He said, and I quote, "Given the General Assembly's
20 stated concern about the cost of identity theft to the
21 marketplace and to consumers, as well as the fact that it
22 created certain limited duties with regard to personal
23 information, for example, the duty to notify affected persons
24 of data breaches and the duty not to intentionally communicate
25 information such as Social Security numbers to the general

1 public, it may seem surprising that our legislature has so far
2 not acted to establish a standard of conduct intended to
3 protect the security of personal information as some other
4 jurisdictions have done in connection with data protection and
5 data breach identification laws. It is beyond the scope of
6 judicial authority, however, to move from aspirational
7 statements of legislative policy to an affirmative legislative
8 enactment sufficient to create a legal duty."

9 I think that sums it up. And that really harkens
10 back to the point I was trying to make at the outset that
11 really at bottom this is a policy debate, where do you put the
12 responsibility, where do you allocate the risk. And that is a
13 policy decision that the Georgia legislature so far has not
14 undertaken, and it may be because they feel none is necessary
15 because they don't want to tax corporations with additional
16 burdens. It may be that they just haven't considered. But for
17 whatever reason, there is no statutory pronouncement and no
18 clear common-law duty established under Georgia law requiring
19 protection of the PII.

20 And, finally, last but not least, Plaintiffs have
21 failed to sufficiently allege any legal cognizable harm that
22 was proximately caused by Equifax. And their failure to allege
23 causation is another reason why their negligence claim fails.

24 Very briefly, I know Your Honor is very familiar with
25 the economic loss rule. If we're right that there is no duty,

1 the economic loss rule provides an additional ground on which
2 the negligence claim can be dismissed. Of course, if Your
3 Honor finds that there is some independent duty in tort, you
4 have held in *Home Depot* that the economic loss rule would
5 because of an independent duty not provide a ground. So I
6 think this claim, economic loss rule defense rises and falls on
7 whether or not the Court finds an independent legal duty that
8 would be contrary to what the *McConnell* court held.

9 So for all those reasons, Your Honor, we believe that
10 the negligence claim deserves a very hard look. It either
11 ought to be dismissed now, or the Court ought to defer ruling
12 until the Georgia Supreme Court gives us more clarity in the
13 *McConnell* case.

14 I want to turn quickly to the negligence per se
15 claim. Negligence per se claims have to be premised on a
16 specific duty. The specific duty that -- and that duty has to
17 be expressly imposed by statute, and where the statutory duty
18 is too indefinite its violation cannot constitute negligence
19 per se. Here what Plaintiffs point to is Section 5 of the FTC
20 Act, but there's nothing in the FTC Act that on its face
21 imposes a specific duty to have reasonable data security.

22 Plaintiffs identify no statutory text imposing with
23 any specificity any duty that they allege. They point to
24 Section 5 of the act and similar state statutes without telling
25 us which ones to contend that those statutes impose a legal

1 duty to safeguard this information. But the FTC Act does not
2 impose any such duty. It's just an unfair deceptive practice
3 act statute. And it says -- you know, prescribes unfair
4 deceptive acts or practices in or affecting commerce.

5 Now, again, we recognize that in *Home Depot* Your
6 Honor found that Section 5 of the FTC Act does support a
7 negligence per se claim. But, again, we do have an intervening
8 decision, one very recent by the Eleventh Circuit in the *LabMD*
9 case that came out this year that we think warrants another
10 look at the negligence per se ruling in *Home Depot*.

11 And for purposes here, and while this isn't -- the
12 language we quote isn't the gist of the -- of what was at issue
13 in *LabMD* -- what was at issue in *LabMD* was whether an
14 injunction that had been issued was specific enough to be
15 enforced -- in the discussion and lead-up to the analysis of
16 the injunction at issue the Eleventh Circuit said that the only
17 possible source of standard of unfairness holding that a
18 failure to maintain a reasonably designed data security program
19 constitutes an unfair act or practice is the common law. And
20 as we've just discussed, the common law based on *McConnell*
21 imposes no such duty as we have discussed.

22 Now, you may say -- and Plaintiffs may say, Well,
23 what does *McConnell* have to do with a federal act? It's an FTC
24 -- you know, it's a federal statute. Why are you imposing --
25 trying to impose *McConnell* as the common law?

1 And the answer to that is this is -- they are
2 bringing a negligence claim under Georgia law. But they are
3 trying to rely on the FTC as the basis of that. So I think you
4 have to look at the common law of Georgia. And there are cases
5 that say in a -- whatever court you're in the courts of that
6 state are presumed to have decided they're common law properly
7 and appropriately and consistently with what the other 50
8 states would do. There are cases to that effect.

9 So I do think *McConnell* is the place you have to go
10 to look at whether or not the common law -- I mean, they don't
11 even allege the Constitution or statute that provides the duty.
12 It's got to be common law. And we say based on *McConnell*
13 common law doesn't support importing the vague language of
14 Section 5 of the FTC Act as a basis for a negligence per se
15 claim in Georgia.

16 So that's negligence per se claim.

17 Quickly, on the Georgia Fair Business Practices Act
18 claim, again, *McConnell III* confirms that the Georgia Fair
19 Business Practices Act claim does not impose the duty that
20 Plaintiffs allege.

21 Why do I say that?

22 Because the *McConnell III* court held that the
23 Plaintiffs' complaint was premised on a duty of care to
24 safeguard personal information that has no source in Georgia
25 statutory law.

1 Now, interestingly, in *McConnell* the Plaintiffs
2 pointed to provisions of the Georgia Fair Business Practices
3 Act as a basis upon which the Court could find a duty to
4 safeguard information. Now, admittedly, those provisions that
5 were pointed to in that case are not the same provisions of the
6 GFBPA that Plaintiffs rely on here. But the point is that
7 Georgia Court of Appeals in *McConnell* was aware the GFBPA had
8 claims in front of it and said directly that the duty of care
9 to safeguard personal information has no source in Georgia
10 statutory law. And we contend that ends the inquiry on whether
11 they state a claim under the GFBPA.

12 There's another defect in the Plaintiffs' GFBPA
13 claims, and that is that they failed to plead reliance.
14 Georgia courts have held that reliance is an essential element,
15 and the statute requires reliance regardless of whether the act
16 at issue is alleged to be deceptive or unfair. That's one of
17 the arguments the Plaintiffs make is they're making an unfair
18 claim, not a deceptive claim. But the statute says that
19 Plaintiff must describe the unfair act or practice relied upon.

20 Here's the problem. The Plaintiffs plead no facts
21 establishing reliance because most of the class members here
22 allege that they didn't give Equifax their personal information
23 at all, much less in reliance on any unfair or deceptive act of
24 Equifax.

25 You know, most of these cases arising under both

1 GFBPA or under these uniform deceptive practice acts deal with
2 some transaction where a consumer was purportedly misled. Here
3 the allegations are that the Plaintiffs through this credit
4 reporting ecosystem didn't have a direct relationship with
5 Equifax. Their PII was given to Equifax by banks and other
6 intermediaries and, therefore, there is -- they can't allege
7 reliance because they didn't do anything. They had no specific
8 undertaking with Equifax that could give rise to an unfair
9 deceptive act directed at them. And, therefore, they aren't
10 able to plead the requisite reliance to support the claim.

11 THE COURT: Mr. Balser, it's fine with me whatever
12 you want to do. Do you want me to let you know how much of
13 your hour you have left?

14 MR. BALSER: Sure.

15 THE COURT: And then if you go over your hour, take
16 that time either from Ms. Sumner or Mr. Haskins? How do you
17 want me to do that?

18 MR. BALSER: Yes, let's do that.

19 MS. SUMNER: Your Honor, I object.

20 MR. BALSER: I don't want to stop. Where are we?

21 THE COURT: All right. You got nine minutes of an
22 hour left.

23 MR. BALSER: Okay.

24 THE COURT: And any excess time I will take away from
25 Ms. Sumner.

1 MR. BALSER: All right. I will do my best to finish
2 in nine minutes. It gets quicker from here.

3 Let's talk about unjust enrichment quickly. So we've
4 got two sets of Plaintiffs here. We've got non-contract
5 Plaintiffs, and that's the bulk of the Plaintiffs. And we've
6 got Plaintiffs who have contracts with Equifax.

7 The non-contract Plaintiffs did not confer anything
8 of value on Equifax for the reason I just explained. They
9 didn't give PII to Equifax. Third parties did. And the
10 contract Plaintiffs are barred as a matter of law from pleading
11 unjust enrichment.

12 Kind of black-letter case law, to recover for unjust
13 enrichment a Plaintiff has to allege that she provided
14 something of value to the Defendant with the expectation that
15 the Defendant would be responsible for the cost thereof. Here
16 there was -- this is not a case where someone said, Hey, I'm
17 giving you my PII and expect you to pay me for it and you
18 didn't. That's the quintessential unjust enrichment claim.
19 And that's why the claim fails for the non-contract Plaintiffs.
20 They allege they didn't give Equifax PII at all.

21 On the contract claims, there's no dispute that we
22 had a contract with the contract Plaintiffs; and a party can't
23 plead unjust enrichment in the alternative when a valid
24 contract exists. And, again, that's black-letter law in
25 Georgia.

1 Quickly on the contract claims, who are these
2 contract Plaintiffs?

3 These are consumers who purchased Equifax credit
4 monitoring or identity theft protection services before the
5 breach. There's no allegation in the complaint that the
6 Plaintiffs failed to receive the services that they bought from
7 Equifax. So they got credit monitoring, and they got identity
8 theft protection that they paid for. There's no contention
9 that we breached the contract in that way.

10 What are they alleging?

11 They are alleging that somehow Equifax's privacy
12 policy has been embedded or incorporated or somehow in the
13 ether tethered to their contract in a way that gives them a
14 contract claim based on the privacy policy. But even if that
15 were right, which it's not, the privacy policy does not impose
16 the duty that Plaintiffs assert here.

17 So they've got to plead a contract with certainty and
18 completeness. They haven't done that. They've sued for breach
19 of this privacy policy that's extrinsic to these contracts, was
20 not incorporated in the contracts. And each of these relevant
21 contracts have a merger clause disclaiming all representations
22 that aren't made on the face of the contract.

23 In any event, even if the privacy policy were somehow
24 to be embedded as part of the contract, Equifax makes clear in
25 the privacy policy that it cannot ensure or warrant the

1 security of any information you transmit to us. So even if the
2 privacy policy were a contractual undertaking, there is no
3 contractual obligation in that policy to support the
4 Plaintiffs' contract claims. So those claims should also be
5 dismissed.

6 They also have an implied contract claim, but when
7 there's an express contract you can't have an implied contract.
8 That's black-letter law also.

9 Quickly on the -- quickly on the UDAP claims, now,
10 Your Honor, in our brief we laid out nine separate reasons why
11 the UDAP claims should be dismissed. And you will be very
12 pleased to know I'm not going through all nine of those. I am
13 going to touch very briefly on a few of them.

14 The first is that Plaintiffs seek an extraterritorial
15 application of other states' consumer protection statutes which
16 they cannot do under the commerce clause. The commerce clause
17 prohibits application of a state statute to commerce that takes
18 place wholly outside of the state's borders. The allegations
19 here are that they had no -- the Plaintiffs had no relationship
20 with Equifax, most of them. And they have conceded that the
21 conduct that they are complaining about which is the data
22 breach took place entirely in Georgia. And, therefore, under
23 the commerce clause in the cases we cite the extraterritorial
24 application of other states' laws is not permitted.

25 And, of course, all of these statutes have -- most of

1 the statutes, not all, have a fraud component; and with the
2 fraud component comes a 9(b) requirement that fraud be pled
3 with particularity. And for the reasons we have outlined in
4 our brief, 9(b) has to be complied with; and the allegations
5 here simply do not comply with the pleading requirements under
6 9(b).

7 And, as I've also discussed already with respect to
8 the non-contract Plaintiffs, they have failed to plead -- a lot
9 of these state statutes require some transaction with the
10 Defendant. I bought their product, and I was misled. Here
11 most of the non-contract Plaintiffs have failed to plead
12 transactions with Equifax because they didn't have any
13 directly. And those are fatal to the state law claim, the
14 other state statutory claims that those Plaintiffs bring. And,
15 as I have already discussed, there are defects in the way that
16 they allege injury which is not sufficient under Georgia law.

17 So, quickly, Your Honor, to the last but not least,
18 the claim based on data breach notification laws, Plaintiffs 12
19 -- Plaintiffs sue under 12 different statutes that do not
20 provide a private right of action. No Plaintiff has pleaded --
21 and no Plaintiff has pleaded any facts showing that any delay
22 in notification under these statutes resulted in an injury.

23 These statutes that are outlined here either facially
24 do not permit a private litigant to sue, or courts have so
25 held. So any claims for breach, private claims brought under

1 those statutes, fail as a matter of law. And, regardless, no
2 Plaintiff has alleged any injury resulting from the delay in
3 notification.

4 Just to point out here, the delay in notification
5 they are complaining about is 41 days, 41 days from the date
6 that Equifax discovered the breach until they give
7 notification, during which time Equifax is doing all those
8 things I outlined in the beginning, trying to figure out what
9 happened, who is affected and the like. Many of those statutes
10 have a 45-day grace period. So in order to prevail, they'd
11 have to prove that 41 days was unreasonable under the
12 circumstances. We don't even get there because there is no
13 allegation that as a result of the delay of 41 days as opposed
14 to some other time that they say would have been reasonable has
15 caused any particular injury.

16 So to sum it up, Your Honor, as I said at the
17 beginning, the Plaintiffs' claims do not fit within the
18 statutes and the common-law tort theories that they assert.
19 There has been no furnishing of the credit report. There are
20 no cognizable injuries. There's no legal duty to support a
21 negligence claim. There's no consumer fraud. So under the
22 current state of the law in Georgia, which is where we are and
23 where the Plaintiffs asked this case to be moved to, the
24 Plaintiffs fail to state a claim; and the complaint should be
25 dismissed in its entirety.

1 THE COURT: Thank you, Mr. Balser.

2 MR. BALSER: Thank you.

3 THE COURT: Let's take a ten-minute break. And then
4 I will hear from you, Mr. Canfield.

5 Court's in recess for ten minutes.

6 (A short recess was taken.)

7 THE COURT: Mr. Canfield, are you next?

8 MR. CANFIELD: I am, Your Honor.

9 We plan to split up the argument on the motion to
10 dismiss in three ways. I'll be addressing the facts, the
11 claims for negligence, the negligence per se and the issue of
12 injury. Ms. Keller will deal with the other issues on the
13 consumer complaint. Then Mr. Siegel and Governor Barnes will
14 split the small business complaint argument.

15 It would be helpful if the Court would let me know
16 when I have used 45 minutes of my argument. Mr. Siegel and
17 Mr. Barnes have agreed to cede me some of their time. I'm not
18 sure that I will need it, but it would help if I have some
19 notice about where I am.

20 Let me begin with a major theme that underlies all of
21 our presentations. Almost all of the major issues raised by
22 Equifax are not new in this district. The same arguments were
23 made and found to be unpersuasive or expressly rejected in one
24 or both of this Court's decision in *Home Depot* and Judge
25 Totenberg's decision in *Arby's* which Equifax totally ignores.

1 Those decisions here in *Home Depot* and *Arby's* are
2 consistent with decisions in dozens of cases around the
3 country. Both in *Home Depot* and in *Arby's*, the court allowed
4 the Plaintiffs' claims for negligence and negligence per se to
5 proceed, as well as claims under state unfair trade practices.
6 Both decisions found that there's a legal duty under both the
7 common law and Section 5 of the FTC Act requiring a major
8 company to use reasonable data security measures. Both cases
9 held that the economic loss rule is not applicable under these
10 circumstances, and both cases found that data breach victims
11 who have incurred time and money to rectify or mitigate the
12 substantial risk of fraud have been injured.

13 Equifax can win its motion to dismiss only if it
14 convinces the Court that its prior decision in *Home Depot* and
15 Judge Totenberg's decision in *Arby's* were wrong. Equifax
16 hasn't even come close to doing that. In its briefing, it
17 largely minimizes both decisions and makes the same arguments
18 as if it were writing on a blank slate.

19 Its essential position is that there are three
20 decisions that occurred after the *Home Depot* decision that
21 somehow changed the law -- the *McConnell* case, the *Collins* case
22 and the *LabMD* case in the Eleventh Circuit. Those cases don't
23 do that. *McConnell* and *Collins* specifically distinguish these
24 -- the decisions in *Arby's* and *Home Depot* and say that there
25 are different facts and circumstances involved.

1 Judge Totenberg in *Arby's* specifically found that
2 *McConnell* was a starkly different case. And the Eleventh
3 Circuit's decision in *LabMD* nowhere holds that there's no duty
4 under Section 5 imposed on Equifax to use reasonable data
5 security standards and doesn't hold that the FTC can't regulate
6 that duty.

7 So we believe the Court can go ahead and decide the
8 pending motions without waiting for further developments of the
9 law in Georgia or the Eleventh Circuit. Mr. Balser's correct
10 *McConnell* is subject to review by the Georgia Supreme Court
11 under cert. He didn't mention that the *Collins* case is also
12 subject to a pending cert petition as well. But as we say, we
13 believe the Court can go ahead and decide these issues.

14 Let me turn now to the facts, not just to provide
15 some background, but because the issues raised by Equifax
16 dealing with negligence, duty and injuries are dependent on the
17 facts. We had extensive factual allegations in our 560-page
18 complaint, and they are very detailed about what happened. We
19 know a lot more as a result of the report that was released on
20 Monday by the Republican staff of the U.S. House Oversight
21 Committee, and that simply amplifies the accuracy of the
22 allegations in our complaint and adds further details.

23 So let me give you basically a high-level review.
24 Equifax is one of the three major credit reporting agencies.
25 That fact is of major significance. Equifax is not a state

1 bureaucrat who inadvertently sent out an e-mail containing
2 somebody's personal information, a bank that failed to redact a
3 Defendant's Social Security number in a court filing or a
4 merchant that failed to protect the numbers on its -- the
5 credit card numbers of its customers. Equifax's entire
6 business is to gather massive amounts of the most confidential
7 consumer data on almost all Americans, and under highly
8 regulated circumstances it's allowed to disclose that data to
9 those with a need to know in connection with financial
10 transactions. That confidential consumer information is
11 critical to the entire functioning of the American economy, and
12 keeping it confidential is essential to allow the American
13 economy to proceed.

14 As a result, Equifax and other credit reporting
15 agencies are a high-value target for cyber criminals and, as
16 the House Committee report put it, have a "heightened
17 responsibility to protect consumer data by providing
18 best-in-class data security." Over the years, Equifax has
19 acknowledged and accepted this heightened security. It's
20 declared in securities filings that the protection and
21 safeguarding of consumer information is paramount to Equifax,
22 and it's touted its commitment to protecting the privacy of
23 personal information.

24 Even after the 2017 breach that's brought us all
25 together, Equifax's CEO acknowledged that heightened

1 responsibility to protect consumer data when he testified
2 before Congress. Here's what he said: "We at Equifax clearly
3 understood that the collection of American consumer information
4 and data carries with it enormous responsibility to protect
5 that data. We did not live up to that responsibility."

6 That admission is an understatement if there ever was
7 one. Equifax's failure, systemic failures at the heart of the
8 company, led to perhaps the most serious data breach in our
9 nation's history in both the type of data that was stolen and
10 in the extent of the corporate misconduct that allowed it to
11 occur.

12 The immediate cause of the breach was Equifax's
13 failure to install a security patch on the Adobe Struts
14 software that he used -- that it used. Equifax knew of the
15 need to install the patch. It was told to install the patch.
16 It was warned by the federal government that if it didn't
17 install the patch cybersecurity -- cyber criminals were active
18 and could get into their systems.

19 And internally Equifax took some action. They had a
20 meeting about it. They sent an e-mail to 450 people, told them
21 you got to fix this patch. Nobody did it. A few months later
22 hackers exploited the vulnerability in that specific -- that
23 that specific patch was designed to fix, took advantage of
24 other weaknesses in Equifax computer systems, maneuvered around
25 the systems undetected for two-and-a-half months and stole the

1 Social Security numbers and other confidential data belonging
2 to roughly half of all Americans, that information that some
3 commentators have referred to as the crown jewels of the
4 American financial system.

5 Equifax had software in place that would have allowed
6 them to see what the hackers were doing, but the software was
7 inactive. That's because the security certificate which was
8 needed to allow it to work had expired 19 months previously,
9 and Equifax never bothered to do that. And at the time they
10 had over 300 other security certificates that they had allowed
11 to expire. The only reason Equifax finally discovered that the
12 breach was taking place is somebody got around to installing
13 that certificate. And when he did that, the software did its
14 job and they learned about the hackers.

15 Equifax has publicly suggested that the breach
16 occurred because of human error, one individual's failure to
17 install that patch. As grossly negligent as that failure was,
18 the problem at Equifax was much more serious.

19 The facts as alleged by Plaintiffs which this Court
20 must accept as true are that Equifax totally abrogated its
21 responsibility for data security, has known for years that its
22 data security systems were inadequate, knew that the company
23 was at a risk of a major data breach, and yet did little or
24 nothing. And we contend that's a result of incompetence, lack
25 of accountability and a corporate culture that minimized the

1 importance of data security.

2 Let me give you a few salient facts that we have
3 alleged that would support that. In August 2016, a year before
4 the breach, a financial indexing firm publicly assigned
5 Equifax's data security efforts and gave it a rating of zero on
6 a scale of one to ten. And they issued the same report a month
7 later -- or a month before the breach started. The situation
8 hadn't been fixed.

9 Also, a month before the breach, Cybernance, another
10 cybersecurity analysis firm, rated the danger of a major data
11 breach at Equifax within the next year as 50 percent. And
12 another independent reviewer gave Equifax a grade of F for
13 application security and D for its failures in patching
14 software.

15 It wasn't just outside reviewers. A couple of years
16 before the breach Equifax had an audit done that disclosed
17 massive problems in its process and procedures for fixing
18 patches on software. They knew it had to be done, and they
19 just didn't do it. As the House Committee concluded in its
20 report, had the company taken action to address its observable
21 security issues prior to this cyber attack, the data breach
22 could have been prevented.

23 Now, the impact of that breach wasn't limited to
24 Equifax. Consumers have been -- have suffered damages that we
25 have alleged and been exposed to a substantial and imminent

1 risk of harm. One analyst noted soon after the breach was
2 announced that, "On a scale of one to ten in terms of risk to
3 consumers, this is a ten." And so long as Social Security
4 numbers are an essential part of our economy, those people, the
5 half of the American public whose Social Security numbers have
6 been publicly disclosed, are at risk for identity theft and
7 fraud.

8 You know, Mr. Balser said that after the breach has
9 occurred Equifax was gravely concerned about the risk to
10 consumers and through its public statements and actions it
11 demonstrated that it was concerned about the substantial risk
12 that consumers faced. It set up a website and told consumers
13 to spend their time checking to find out if they had been
14 affected; and consumers spent time figuring out if they were
15 affected and, if they were, trying to figure out what they
16 needed to do to protect themselves. Equifax advised consumers
17 to mitigate the risk by freezing their credit.

18 Equifax made credit freezing free at Equifax, but
19 that's not enough to protect consumers. A consumer has got to
20 freeze credit at all three credit bureaus, and that takes time.
21 It takes roughly an hour or so on the phone with one of these
22 credit reporting agencies. And there's a cost involved,
23 anywhere from 10 to 40 dollars per transaction depending on the
24 state you lived in at the time. And people have to continue to
25 freeze and unfreeze their credit if they apply for loans, want

1 to buy a car, that sort of thing. So it costs a lot of money.

2 Mr. Balser pointed out Equifax also made its own
3 credit monitoring services to consumers who wanted to sign up
4 for it. Millions did. But there were a lot of consumers who
5 didn't trust Equifax and they didn't want to use Equifax's
6 credit monitoring services. So they had to go and buy similar
7 services elsewhere. And so they incurred that cost to protect
8 themselves to do what Equifax said they should do, but they
9 just didn't trust Equifax to do it right.

10 So in addition to the time and money that consumers
11 have done to minimize this substantial risk that Equifax knew
12 about and told consumers about, we have alleged that consumers
13 have been victimized already by fraud and identity theft. We
14 have alleged that the information that's been stolen is already
15 being used by consumers. We have lots of examples that -- I
16 never counted them, but Mr. Balser said 39 of our class
17 representatives have alleged that they have already been
18 victimized by identity theft. And I'll just give you a few
19 examples.

20 John Simmons who is a Georgia resident had
21 unauthorized accounts opened in his name, and his home loan was
22 delayed because his credit score dropped.

23 Alan Levino was notified through the mail that his
24 debit card he had previously used to unfreeze his credit at
25 Equifax was compromised in the breach. He has had unauthorized

1 charges on that same debit card since the breach occurred.

2 James McGonagal has had more than ten unauthorized
3 credit card accounts opened in his name using the information
4 that was stolen in the Equifax breach.

5 And Jennifer Twedodle has had unauthorized accounts
6 opened in her name using information that was stolen in the
7 breach, and her credit score dropped 79 points as a result of
8 fraudulent charges.

9 That's it. Those are the two big buckets, taking
10 steps and incurring costs to mitigate the harm that Equifax
11 told them they should do and the harm that they have incurred,
12 the actual money that they have spent trying to clean up these
13 fraudulent episodes that they've been subjected to.

14 That's basically my overview of the facts. Let me
15 turn to the negligence claim.

16 Equifax's first argument, as the Court has heard, is
17 that it has no duty, no legal duty to protect all this
18 confidential information that it collects, an argument that
19 flies in the face of what its CEO told Congress. Regardless,
20 the argument is simply wrong. In *Arby's* Judge Totenberg held
21 "that allegations that a company knew of a foreseeable risk of
22 its data security systems are sufficient to establish the
23 existence of a plausible legal duty and survive a motion to
24 dismiss."

25 This Court reached the same conclusion. The rulings

1 in both *Home Depot* and *Arby's* are founded in a well-established
2 legal principle that is incorporated in the *Restatement of*
3 *Torts* and recognized by the Georgia courts that there is a
4 general duty one owes to all the world not to subject them to
5 an unreasonable risk of harm. That duty extends to harm that
6 is foreseeable, and the duty is discharged by exercising the
7 same degree of care that ordinarily prudent persons would
8 exercise under the same or similar circumstances.

9 That's our case.

10 And this Court's decision in *Home Depot* and the
11 *Arby's* decisions aren't the only data breach cases that have
12 used this general duty owed to the entire world to recognize
13 that a negligence claim can be brought. *Target*, for example,
14 was one. So this Court was on sound legal ground in doing what
15 it did in *Home Depot*, as was Judge Totenberg and all the other
16 judges around the country.

17 In its briefing, *Home Depot* made a bunch of different
18 arguments for why the Court -- why the law doesn't support
19 that, but the only one that I'm really going to address is its
20 new argument that the *McConnell* case means this Court got it
21 wrong. And they're just -- Equifax's reliance is misplaced.

22 *McConnell*, as Judge Totenberg held, is starkly
23 different both on the facts and on the law. On the facts, a
24 state employee inadvertently sent out an e-mail to a thousand
25 people that contained some sensitive information about people

1 who had dealings with the Department of Labor. As Judge
2 Totenberg noted, there were no allegations of known security
3 deficiencies, no involvement of criminal hackers, no questions
4 whether the disclosure was foreseeable. It's not just an issue
5 of foreseeability. It's the issue that this is -- it wasn't a
6 data breach case. It was somebody just inadvertently sent out
7 an e-mail.

8 And the Georgia Court of Appeals in *McConnell I*
9 itself distinguished *Home Depot* on that basis and said those
10 allegations aren't this case. It is one thing to hold that an
11 individual state bureaucrat or the agency for which he works
12 has no duty, no legal duty to maintain the confidentiality of
13 sensitive information. It's another thing to hold that one of
14 the three major credit reporting agencies is authorized by --
15 has no duty. And these factual differences matters. Existence
16 of a legal duty is not decided in a vacuum.

17 *McConnell* is also different on the law. What the
18 court did is to focus on two Georgia statutes, the Georgia data
19 breach notification statute and the Georgia statute that
20 precludes the intentional disclosure of Social Security
21 numbers. And it focused on those statutes, and it said there's
22 nothing in those statutes that imposes liability when a state
23 employee sends out an e-mail.

24 Significantly, the general duty one owes to the
25 entire world that this Court and others have relied on was not

1 addressed in *McConnell III*, the only opinion that sort of rides
2 at this point. It was briefly addressed in a footnote in
3 *McConnell I*, but it was pulled out when they reissued their
4 opinion. Obviously, we don't know why that was. But there's
5 no indication either certainly in *McConnell III* that it has
6 anything to do with the general duty. It certainly didn't
7 overrule or attempt to overrule *Bradley Center v. Wessner*, and
8 it didn't limit *Bradley v. Wessner* to the facts in the way that
9 Mr. Balser has contended and which our argument was made in the
10 *Home Depot* case and in the *Arby's* case and this Court and Judge
11 Totenberg found to be unpersuasive.

12 The issue under *Wessner* can involve the question of
13 whether there's a duty to control somebody that might commit a
14 criminal act or do something that results in some injuries, but
15 it can result in other ways. The Defendant doesn't have to
16 control a third party, and that's not -- we're not alleging
17 that Equifax failed to control a third party. We're alleging
18 that Equifax failed to meet its own duty to prevent this data
19 breach.

20 There are lots of decisions both in the Georgia
21 courts and in this court in which the general duty has been
22 applied in situations well outside of the circumstances in the
23 *Bradley Center* case. There is a case in which a tire retailer
24 was held to have a duty that extended not just to the person
25 who bought the tire but to passengers in a car that was -- that

1 ended up in a wreck as a result of a defective tire. And there
2 are lots of other circumstances.

3 But I want to call the Court's attention to the
4 Eleventh Circuit's decision in *Braun v. Soldier of Fortune*
5 *Magazine*. And the cite is in our -- the slides that we've
6 furnished the Court. It's not cited in our brief.

7 But in that case, the Eleventh Circuit affirmed a
8 wrongful death judgment against *Soldier of Fortune Magazine*
9 which the jury found had published what in effect was a
10 personal services ad for a hit man going out to kill somebody;
11 and the family of the victim filed a lawsuit. The magazine
12 offered -- or argued it had no duty. And the Eleventh Circuit
13 disagreed, finding that the duty arose from the same principle
14 that this Court used in *Arby's* and *Home Depot* and recognized by
15 the Georgia courts, namely the general duty to avoid subjecting
16 others to an unreasonable risk of harm.

17 And in interpreting Georgia law and citing to Georgia
18 cases, the Eleventh Circuit fleshed out a little bit about what
19 this general duty means. And it said that the Georgia courts
20 apply a risk utility test in determining what's an unreasonable
21 risk of harm. Let me quote from the Eleventh Circuit. It
22 said, "A risk is unreasonable if it is of such magnitude as to
23 outweigh what the law regards as the utility of the Defendant's
24 alleged negligent conduct. Simply put, liability depends upon
25 whether the burden of the Defendant of adopting adequate

1 precautions is less than the probability of harm from the
2 Defendant's unmodified conduct multiplied by the gravity of the
3 injury that might result from the Defendant's unmodified
4 conduct."

5 The risk utility analysis obviously depends on the
6 factual conduct. And because the *McConnell* court never even
7 addressed this general duty, we don't know how it would have
8 come out on this risk utility analysis. But the outcome seems
9 fairly obvious. In *McConnell*, one person sending out an e-mail
10 and the relative risk was relatively minor, not stolen by
11 hackers, no evidence or reason to believe that anyone had ever
12 used it. It's just an e-mail had been sent.

13 In this case, the risk that criminals would steal
14 Plaintiffs' confidential information as I mentioned was
15 enormous; and the extent of that harm that would have been
16 inflicted if such a data breach occurred obviously was massive.
17 And it was so massive that a number of commentators, including
18 the House Committee in its report, have recommended that the
19 use of --

20 MR. BALSER: Your Honor, I'm going to object right
21 here. I let him say it once, but that report's not in the
22 motion to dismiss record. It should not be referred to and
23 should not be considered by the Court on this record.

24 THE COURT: All right. Mr. Balser, I'll give the
25 argument the weight and credit that it's due.

1 MR. BALSER: Thank you, Your Honor.

2 MR. CANFIELD: Regardless of what the House Committee
3 said --

4 THE COURT: Go ahead, Mr. Canfield.

5 MR. CANFIELD: -- the recommendation is that the use
6 of Social Security numbers to identify consumers for purposes
7 of financial transactions be reduced, if not eliminated.

8 And can you imagine the expense that's going to go
9 into that?

10 And it ought to be taken into account in this risk
11 utility analysis.

12 Accordingly, nothing in *McConnell* is inconsistent
13 with this Court's reliance on the general duty in both *Home*
14 *Depot* and *Arby's*.

15 Let me move to the economic loss rule, and there's
16 not a lot of reason to spend a lot of time on it. Both this
17 Court and Judge Totenberg rejected it, its application in a
18 data breach case like this one. Equifax is not arguing
19 anything that's new.

20 I just want to make two points. The economic loss
21 rule only applies when there are contracts, and lots of cases
22 have made that clear. There's a Court of Appeals decision in
23 Georgia that sort of suggests that that might extend to a tort
24 case under certain circumstances. But when you dig into that
25 case -- and they've cited it, and I think you ought to read it

1 -- that that's not really what it holds. And it makes sense
2 that it's limited to contract cases because the whole policy
3 principle underlying the rule is that when the parties are in a
4 contract with each other they can allocate the risk between
5 themselves in the contract. And if there's no contract,
6 there's no way of doing that.

7 Second, the economic loss rule doesn't apply when the
8 tort claim is based on the breach of a legal duty arising
9 independent of the contract. And that's the case here, not
10 just on a -- under the general duty but also under Section 5 of
11 the FTC Act.

12 Let me turn to negligence per se. Georgia law
13 recognizes that a Plaintiff has a claim for negligence per se
14 if the Defendant violates a standard of conduct that's imposed
15 by law. Section 5 of the FTC Act imposes a standard as to
16 reasonableness in the FTC's words on its website, "A company's
17 data security measures must be reasonable in light of the
18 sensitivity and volume of consumer information that it holds,
19 the size and complexity of its data operations and the cost of
20 available tools to improve security and reduce vulnerability."

21 This Court, *Arby's* -- and Judge Totenberg in *Arby's*
22 and other courts have held that Section 5's standard of conduct
23 can be enforced through a negligence per se claim. All of the
24 claims that Equifax makes now were previously expressly
25 rejected and were found unpersuasive. Section 5 is not

1 specific enough to be enforceable. But in *Teague v. Keith* the
2 Georgia Supreme Court specifically held that where a statute
3 provides a general rule of conduct, although amounting only to
4 a requirement to exercise ordinary care, the violation thereof
5 is negligence per se.

6 They also claim that the obligation to use reasonable
7 care with regard to data security isn't expressly set out in
8 the statute. It's not required to be set out. Congress
9 delegated to the FTC to flush out the meaning of unfair and
10 deceptive trade practices through directives and litigation
11 which is what the FTC has done. And Georgia law is
12 specifically clear that you don't have to have a statute to
13 have a claim for negligence per se. All you need to have is a
14 directive or standard imposed by law.

15 So the only new argument that Equifax makes is this
16 *LabMD* decision. That case doesn't involve a negligence per se
17 claim. It doesn't hold that the FTC cannot regulate the lack
18 of reasonable data security measures under Section 5, and it
19 doesn't hold that there's no duty with regard to data security
20 under Section 5.

21 The issue in *LabMD* was whether the cease-and-desist
22 order that the FTC had imposed on *LabMD* after a data breach was
23 specific enough to be enforced by a court. The Eleventh
24 Circuit held that the order was not because the order merely
25 required *LabMD* to adopt a reasonable data security program

1 without spelling out the particular things *LabMD* had to do to
2 meet its obligations under the order. And according to the
3 Eleventh Circuit, without detailed obligations specified in the
4 order a court wouldn't know who -- and there was a dispute
5 about what was reasonable -- the Court wouldn't know who was
6 right.

7 And, in fact, the Eleventh Circuit had a long,
8 lengthy hypothetical about what would happen if the issue was
9 litigated and gave us an example what would happen if the FTC
10 and *LabMD* disagreed about what was reasonable and put on
11 experts supporting each other's positions. The Eleventh
12 Circuit said the court can't be in the position of trying to
13 figure out which expert is right because it could put the court
14 in the position of essentially having to oversee *LabMD's* entire
15 data security operation.

16 That's obviously not the situation here. Our
17 negligence per se claim does not require this Court to design
18 the data security program or oversee how that program would be
19 implemented by Equifax. Rather, the Court will instruct the
20 jury that under Section 5 Equifax had a duty to use reasonable
21 data security measures; and it will be up to the jury to
22 determine based on all the evidence whether Equifax met its
23 duty. It's what juries do all the time. So the case does not
24 say what Equifax is saying here, and certainly the Federal
25 Trade Commission does not read *LabMD* in the way that Equifax

1 does.

2 As noted in the House Committee report --

3 MR. BALSER: Same objection, Your Honor.

4 THE COURT: Same ruling.

5 MR. CANFIELD: Equifax has made the following
6 disclosure in a recent SEC filing: "On June 13, 2018, the CFPD
7 and the FTC provided us with notice that the staffs of the CFPD
8 and FTC are considering recommending that their respective
9 agencies take legal action against us and that the agencies may
10 seek injunctive relief against us as well as damages and civil
11 money penalties."

12 So it would be a very strange thing if the FTC is
13 moving forward, imposed this duty that the law recognizes on
14 Equifax, but the Plaintiffs in this case for some reason can't
15 enforce the same duty through a negligence per se claim. And,
16 regardless, even if Equifax were right, which it's not, that
17 somehow Section 5 can't be enforced through a negligence per se
18 claim, the standard of care that the FTC has adopted, the
19 reasonableness standard, is still relevant in analyzing whether
20 there's a legal duty in a negligence case. The specific
21 situation was addressed by the Georgia Court of Appeals in
22 *Brock v. Avery* which is cited by Equifax, and in that case the
23 Defendant argued that a statute that the Plaintiff contended
24 had been violated was not specific enough to be enforced.

25 What the Court of Appeals said is, "A violation of

1 that statute would not constitute negligence per se as it's too
2 indefinite for enforcement, but it does furnish a rule of civil
3 conduct under the circumstances of each case, and the jury may
4 find negligence in fact as a result of its violation."

5 That's our situation. So Equifax can't just make the
6 FTC -- Section 5 of the FTC Act go away. We think it can be
7 enforced through a negligence per se claim as this Court has
8 already held. If not, it's relevant to the duty analysis. And
9 that argument was never considered in any of the cases that --
10 certainly *McConnell* or any other case that Equifax relies on.

11 I want to move on now to Equifax's last argument that
12 I'm going to address that no Plaintiff has suffered legally
13 cognizable harm. And I think, as Mr. Balser conceded, each
14 class representative has alleged that each of them have been
15 injured, each has incurred time and money as a result of the
16 breach either to rectify identity fraud that's already occurred
17 or to mitigate the substantial risk that identity fraud will
18 occur in the future.

19 The overwhelming majority of courts have held that
20 such allegations are sufficient to create standing or survive a
21 motion to dismiss on the merits. The *Resnick v. AvMed* case in
22 the Eleventh Circuit says Plaintiffs allege that they have
23 become victims of identity theft and have suffered monetary
24 damages as a result. This constitutes an injury in fact.

25 I didn't hear Mr. Balser say anything to the

1 contrary. And, in fact, during his presentation he said that
2 the *Collins* case that he was going after in his argument with
3 regard to damages generally only dealt with a portion of
4 Plaintiffs' allegations of damage. And I presume the ones that
5 they're not contesting are the allegations that people have
6 actually spent money to rectify fraud that has already
7 occurred. There's not much doubt that that's an injury that's
8 cognizable under any state's laws.

9 This Court dealt with a situation in connection with
10 the financial institutions in *Home Depot*. Judge Totenberg also
11 dealt with it with regard to damages that had been suffered by
12 consumers. And she held that allegations of monetary losses,
13 including, "Unauthorized charges on their accounts, theft of
14 their personal financial information and costs associated with
15 detection and prevention of identity theft are sufficient to
16 survive a motion to dismiss."

17 And we've cited many, many other cases in both
18 districts and circuit courts that have reached the same
19 conclusion. In its briefing, Equifax tries to avoid this case
20 law by not challenging the standing of any Plaintiff since a
21 lot of these cases involve standing issues, but they instead
22 argue that on the merits Plaintiffs' allegations are
23 insufficient under Georgia law to satisfy the injury elements
24 of our claims. But that effort to redefine the injury analysis
25 and to avoid all of the contrary law is unavailing and doesn't

1 make much sense.

2 As the Seventh Circuit held in the *Barnes & Noble*
3 case, "To say that Plaintiffs have standing is to say that they
4 have alleged injury in fact. And if they have alleged injury
5 -- if they have suffered injury, then damages are available."
6 And then Judge Totenberg went further and specifically held
7 that the types of injuries that we allege are legally
8 cognizable in Georgia, not as a matter of standing but as a
9 matter of Georgia substantive law.

10 So I'm not quite sure I understood this spider chart
11 that Equifax has put together or what its purpose was. It
12 showed that all the Plaintiffs are injured. It tried to break
13 down the types of injuries into -- in different ways. But the
14 way that I think the Court can do it is to look at three
15 different buckets. One is time and money that's already been
16 spent, that's been spent dealing with fraud that's already
17 occurred. The second bucket are the mitigation risks that
18 Plaintiffs have incurred to protect themselves against the
19 substantial risk of future harm like buying credit monitoring
20 services, freezing and unfreezing their credit. And then the
21 third bucket involves nominal damages. And I'll talk about
22 each one of those three.

23 Let me start with the first one, actual out-of-pocket
24 losses and time spent rectifying fraud that's already occurred.
25 None of the cases that Equifax cites say that damages that fall

1 under that bucket are not recoverable. The cases simply hold
2 that no actual identity theft or fraud had occurred in those
3 cases. And if there wasn't any actual identity theft or fraud
4 that occurred, obviously there wasn't any out-of-pocket loss
5 that was spent on those cases.

6 Their first case is the *Finnerty* case. That was the
7 case in which a bank included a Plaintiff's Social Security
8 number in a complaint filed in court. And the court held that
9 there was no evidence or reason to believe anyone other than
10 the parties ever saw the Social Security number, and certainly
11 there was no evidence that it had ever been used.

12 *Rite Aid*, the other one, big one that they relied on
13 involved a pharmacy that was going out of business. And it
14 sold all of its customers' pharmacy records to another pharmacy
15 that was in the same town, and a class action was brought
16 saying that it violated the rights of the customers involved.
17 And the court held that both pharmacies were required by law to
18 keep the records confidential, and the Plaintiff admitted he
19 had no evidence that any other authorized person had seen the
20 records, and he didn't allege that he had any actual financial
21 injury as a result of the sale. Those cases simply don't hold
22 what Equifax wants this Court to believe they say.

23 THE COURT: Mr. Canfield, you asked me to notify you
24 at the 15-minute mark. You are there.

25 MR. CANFIELD: Okay. Thank you, Judge.

1 The second bucket is the mitigation costs. Equifax
2 doesn't dispute that a substantial risk of harm will justify
3 mitigation expenses. It can't. The Supreme Court has held
4 that they can. It's well recognized under the law. The
5 *Restatement of Torts*, Section 919, specifically recognizes that
6 people have a right to recover mitigation expenses if they're
7 reasonably incurred to avert harm. And whether there's a
8 substantial risk of harm -- or where there is a substantial
9 risk of harm courts almost universally hold that mitigation
10 costs are recovered.

11 The issue, thus, is whether the risk of harm is
12 substantial and if that risk was substantial whether the
13 Plaintiffs acted reasonably in incurring these mitigation
14 costs. Those are fact issues that can't be resolved on the
15 basis of the pleadings, and certainly it's plausible that in
16 the face of one of the most serious data breaches in our
17 nation's history that consumers faced a substantial risk of
18 harm that justified them taking action to protect themselves.

19 In its brief, Equifax goes beyond saying there's no
20 substantial risk of harm, that Plaintiffs haven't alleged it.
21 They actually make the statement, "It is not likely that any
22 Plaintiff will suffer future harm from the Equifax data
23 breach." That's another example of Equifax saying one thing to
24 this Court and something totally different to the public and
25 the regulators.

1 After the data breach, Equifax didn't say to
2 consumers, Your confidential information was stolen. But don't
3 worry. There's no substantial risk that anybody's ever going
4 to use it. They didn't tell regulators, No harm, no foul, it's
5 unlikely anybody's going to get hurt.

6 They took the exact opposite approach. They warned
7 consumers. They advised consumers about the risk. They touted
8 their efforts to fix the problems to prevent that risk from
9 occurring in the future. And Mr. Balser's told you about what
10 they did. That demonstrates that Equifax knew that there was a
11 serious and substantial risk, and it certainly makes our
12 allegation that that risk exists to be plausible. And as a
13 result, this Court would act inappropriately if it dismissed
14 our claims.

15 Equifax's position here is particularly out of line
16 for another reason. For years Equifax has sold its own
17 identity theft protection services, including credit
18 monitoring. In order to sell them those services, it didn't
19 tell consumers data breaches aren't really a problem, but if
20 you have got a little bit of concern maybe you can buy our
21 product. They touted the importance of protecting yourself
22 from a data breach. And their advertising talked about the,
23 quote, great risks for identity theft and fraud that result
24 from the data breach.

25 Now, Equifax's entire argument on mitigation risk

1 deals with *Collins*; and *Collins* can be explained very easily.
2 As the quote that Mr. Balser put up said, the court in that
3 case determined that the risk of harm was speculative, not
4 substantial. It didn't do a substantial risk analysis, but it
5 said it's speculative because there's absolutely no allegation
6 that any criminal had ever used the information and no
7 Plaintiff argued that they hadn't actually been victimized by a
8 data breach which are the facts here. And, in fact, *Collins*
9 distinguished *Arby's* on that very ground, said it's a different
10 case. There were no allegations in *Collins* that the Defendant
11 had advised the people that had had their information stolen to
12 take action and protect themselves and no allegations, as I
13 said, that there was -- that would otherwise support
14 substantial risk.

15 But regardless of the fact that it is distinguishable
16 both on the facts and the law, there's another reason not to
17 rely on it. The case is not binding precedent. There was a
18 dissent. It's physical precedent under the rules of the
19 Georgia Court of Appeals. The decision only has the same
20 effect as a decision from a court from a state other than
21 Georgia. It's persuasive, the Court can deal with it, but it's
22 not bound by it. And in light of all the other decisions that
23 -- elsewhere that have held in favor of Plaintiffs' position in
24 this case, *Collins* is relatively unimportant.

25 There's another reason. There's a pending cert

1 petition in *Collins*, and that yet hasn't been decided. So we
2 don't know what the final word is going to be on that
3 particular issue. But as we said before, it's not necessary to
4 wait. It's such a different case it really doesn't affect this
5 one.

6 Now, let me talk briefly about the third bucket.
7 Separate and apart from actual costs that are incurred
8 remedying or mitigating fraud, the Georgia law allows damages
9 where no actual -- nominal damages where no actual damage flows
10 from an injury. So the question here is whether in the absence
11 of any actual damages Plaintiffs have suffered an injury as a
12 result of Equifax's conduct that would allow for a jury to
13 impose nominal damages. That question is not addressed by any
14 Georgia case whether information that is stolen by a criminal
15 for the purpose of committing fraud creates an injury to that
16 Plaintiff as a result of that theft when the theft is allowed
17 to take place because of the Defendant's negligence.

18 There are good reasons to hold that there is an
19 injury allowing -- that would allow nominal damages under those
20 circumstances. Judge Koh in the *Anthem* case held that the loss
21 of consumers' confidential data is a sufficient injury. And in
22 Georgia the law infers some damage from the invasion of a
23 privacy right that would allow nominal damages, and that's what
24 we allege to be the case here.

25 I'm going to sit down now, Judge, and let my

1 colleagues take it from here. Thank you very much. It's been
2 an honor arguing in front of you today.

3 THE COURT: Thank you, Mr. Canfield.

4 Ms. Keller?

5 MS. KELLER: Good morning, Your Honor. Amy Keller
6 for the consumer Plaintiffs. And I will be brief.

7 So I'd like to begin my discussion by focusing on
8 Plaintiffs' FCRA claims. FCRA's purpose is to protect the
9 privacy of consumer data and limit the circumstances under
10 which it can be disseminated by consumer reporting agencies
11 such as Equifax. Plaintiffs allege that Equifax violated FCRA
12 by furnishing Plaintiffs' consumer reports in violation of
13 1681(b). Nothing in FCRA authorizes the CRA to furnish
14 consumer reports to unauthorized or unknown entities.

15 Plaintiffs have alleged that Equifax failed to
16 maintain reasonable procedures designed to limit furnishing of
17 consumer reports to the purposes listed under Section 1681(b),
18 and that's in violation of Section 1681(e). Plaintiffs allege
19 that Equifax was both negligent as well as willful and reckless
20 in failing to maintain these safeguards.

21 Now, Equifax's counsel claims that this is a Hail
22 Mary pass. Your Honor, to the contrary. While we haven't seen
23 circumstances as egregious as this one in other cases, Congress
24 passed a statute to govern how CRAs must handle our most
25 sensitive data. Equifax did not meet the bar set by Congress.

1 Now, first, Your Honor, the Court should not accept
2 Equifax's invitation to let it evade liability under the FCRA
3 through corporate segmenting. You heard from Mr. Balser that
4 there's an important distinction regarding from which entity
5 the data was actually obtained. But Plaintiffs have raised a
6 question of fact in their complaint regarding Defendant's
7 corporate structure alleging that Equifax, Inc. and its
8 subsidiaries, Equifax Information Services, LLC and Equifax
9 Consumer Services, LLC, operate together as an integrated CRA.
10 In fact, its front-facing consumer websites don't distinguish
11 between ECS, EIS or Equifax, Inc. And Equifax itself admits
12 that EIS is a CRA.

13 The complaint contains allegations regarding that the
14 companies freely share FCRA restricted information, profits,
15 management and operate as one entity and one CRA and alter egos
16 of one another. Those are paragraphs 116 through 121. Indeed,
17 even as the House Oversight Committee called Equifax a CRA --
18 and I acknowledge the previous objection that makes reference
19 to the House Oversight Committee report -- and acknowledge that
20 Equifax --

21 THE COURT: Mr. Balser, they can easily add that by
22 amendment. So I'm not going to make a big issue out of it. I
23 understand your objection.

24 MR. BALSER: All right.

25 MS. KELLER: And Equifax's ACIS -- that's the

1 Automated Consumer Interview System; that was the tracking
2 system that was breached in this case -- was developed to meet
3 the requirements of the FCRA. As the cases that Equifax cites
4 on this issue demonstrate, the Court should visit this issue on
5 summary judgment. It would be inappropriate to dismiss
6 Plaintiffs' claims against any of the Equifax entities for the
7 FCRA because one may or may not be a CRA at the motion to
8 dismiss stage when there's a question of fact that's been
9 raised in the complaint.

10 Your Honor, turning to Equifax's furnishing argument.
11 So Equifax claims that it didn't furnish the reports because
12 the attackers stole information from Equifax. The Fair Credit
13 Reporting Act does not define what it means to furnish, so
14 courts have typically looked at the case law to determine this.

15 Now, to make this argument, Equifax relies upon
16 several cases -- the *Nationwide Insurance* case, *Experian* and
17 *Dolmage*. But those cases demonstrate the vast factual
18 differences between typical data breach cases and the
19 incredibly unique set of circumstances in front of Your Honor.
20 For example, in the *Nationwide Insurance* case the Plaintiffs
21 only allege that *Nationwide* had been a victim of the breach and
22 that because of the breach *Nationwide* must not have had certain
23 industry standard cybersecurity safeguards in place. But the
24 proposed first amended complaint based all of this on
25 assumptions.

1 In *Experian*, Your Honor, Plaintiffs pointed to prior
2 data breaches and interviews from frustrated former employees
3 who felt that advances to cybersecurity efforts had been
4 stymied by the company. The *Experian* consolidated amended
5 complaint never specifically said what led to the breach in
6 that situation.

7 And then in *Dolmage* a third-party vendor's employee
8 copied sensitive information onto its computer which was then
9 made available on the internet. The company, *Combined*
10 *Insurance*, did not engage in the conduct; and the Plaintiff in
11 that complaint did not even allege that the company was, in
12 fact, a consumer reporting agency.

13 Contrast those fact patterns with the one before you,
14 Your Honor. The cases do not counsel supporting dismissal at
15 this stage. If anything, those cases demonstrate that our case
16 is more egregious. None of the cases concern a specific threat
17 that could have been fixed with a specific patch when if
18 applied could have completely prevented the specific breach
19 here from occurring.

20 The situation becomes even more extreme because, as
21 my colleague, Mr. Canfield, explained earlier, Equifax ignored
22 warnings of its lax cybersecurity. Congressman Greg Walden
23 said it's like the guard at Fort Knox forgot to lock the doors
24 and failed to notice the thieves were emptying the vaults.
25 Actually, it's more than that, Your Honor. The guards were

1 warned about the thieves that were right outside. They were
2 warned that the doors didn't lock. They didn't bother to fix
3 the locks, and they didn't even bother to check that they were
4 being robbed.

5 Now, whether Equifax's actions rise to the level
6 necessary to constitute furnishing, it's not something the
7 Court need decide today. The Court need only determine that we
8 have alleged enough to raise a plausible argument that
9 Equifax's elected course of conduct amounted to some act that
10 resulted in the transmission of this data to wrongdoers. If
11 the Court is not satisfied, we could likely allege more based
12 upon the House Oversight Committee report -- and, again, we
13 acknowledge the objection -- Senator Warren's report and
14 whatever remains outstanding from other governmental agencies
15 and lawmakers.

16 We are not asking the Court to depart from
17 established precedent. We are acknowledging that the precedent
18 does not match the circumstances in this case.

19 THE COURT: Ms. Keller, it's fine with me; but your
20 hour is up. So are other Plaintiffs going to cede you some of
21 their time?

22 MR. SIEGEL: I have, Your Honor.

23 THE COURT: All right. Fine.

24 Go ahead, Ms. Keller.

25 MS. KELLER: And, Your Honor, I will quickly breeze

1 through the rest of this.

2 Equifax next argues that the very reason why it
3 assembled all of this information to determine the
4 creditworthiness of the 148 million Americans whose personal
5 information was compromised should be ignored because it
6 doesn't constitute a consumer report. But the FCRA defines
7 consumer report very broadly saying written, oral or other
8 communications of any information by a consumer reporting
9 agency bearing on a consumer's creditworthiness, credit
10 standing, credit capacity, character, general reputation,
11 personal characteristics or mode of living.

12 In fact, Your Honor, *Parker v. Equifax* -- that's a
13 case upon which Equifax relies -- says that depending on
14 context header data may well function effectively as a consumer
15 report. Based upon this definition, Your Honor, the Court can
16 look at our complaint and see numerous instances of information
17 constituting a consumer report. There are specific examples
18 within the class of individuals whose information goes to mode
19 of living, credit capacity or creditworthiness.

20 For example, the class consists of a large number of
21 consumers who had their credit card information compromised.
22 That they had a credit card surely goes to their
23 creditworthiness or their credit capacity. And those
24 individuals whose driver's licenses were stolen that
25 information goes toward mode of living that they were able to

1 obtain a driver's license.

2 *TransUnion v. FTC* says that the definition of
3 consumer report does not seem very demanding, and almost any
4 information about consumers arguably bears upon their personal
5 characteristics or mode of living. In that case, Your Honor,
6 the Court found that lists containing only a person's name,
7 address and whether, for example, he or she had a credit card
8 was enough to make the information a consumer report.

9 Your Honor, turning to Equifax's argument that it did
10 not know the identity of the hackers and, accordingly, an
11 expectation that Equifax follow the law and provide adequate
12 disclosures of the breach would somehow be absurd, we don't
13 need to get into the identity of the hackers today.

14 *FTC v. Citigroup* says that a motion to dismiss is not a legal
15 procedure to resolve issues of fact and whether the identities
16 of the hackers were known or not. Plaintiffs allege that
17 Equifax deprived consumers of their right to receive clear and
18 accurate disclosures in violation of 1681(g).

19 Your Honor, turning next to the Georgia Fair Business
20 Practices Act claims, my colleague has already engaged in a
21 fulsome recitation of *McConnell* and the issues regarding duty
22 related to *McConnell*. However, Equifax has also challenged
23 Plaintiffs' Georgia Fair Business Practices Act claims because
24 of *McConnell*. However, instead of looking at *McConnell* which
25 Mr. Balser recognized does not concern the same instances of

1 the Georgia Fair Business Practices Act, the Court should
2 instead look to *Arby's* which we have brought up to the Court in
3 Mr. Canfield's argument.

4 In *Arby's*, the Court determined that in order to
5 ensure that consumers are protected the GFBPA must be strictly
6 construed against a business which engages in unfair or
7 deceptive acts and that the act seeks to prohibit. In that
8 case again, Your Honor, it distinguished *McConnell* finding that
9 there were no similar allegations of a known security
10 deficiency in the *McConnell* case. Accordingly, there's no need
11 to stretch the holding in *McConnell* to fit this case when
12 *Arby's* is on point.

13 Your Honor, I briefly want to address reliance under
14 the GFBPA. Equifax attempts to evade liability for its
15 wrongdoing by arguing that Plaintiffs have not relied upon the
16 numerous misrepresentations about security that it made in its
17 advertisements, its website and its written materials.
18 Equifax's numerous misstatements about security aside, had
19 Equifax actually informed consumers and the public that it
20 failed to install patches on high-risk vulnerabilities,
21 Plaintiffs allege that it would not have been able to be in
22 business. And that's paragraph 374. The companies such as the
23 financial institutions that furnished data to Equifax would
24 have stopped, and Equifax would have been required to adopt
25 reasonable security measures.

1 Accordingly, even though you don't have to show
2 reliance for omissions-based claims or claims of unfairness as
3 *Arby's* and *Anthem* have stated previously, there would have been
4 no need. Equifax would not have been in business.

5 Your Honor, Equifax also argues for the dismissal of
6 Plaintiff's UDAP claims for several reasons. But these claims
7 are largely based upon Section 5 of the FTC Act and are similar
8 to the Georgia claims. None of the cases Equifax cites would
9 prevent states from ensuring that its residents have the
10 protections provided by those states if an out-of-state
11 tortfeasor were to cause injury to them.

12 Other cases such as *Target* have allowed other such
13 claims to proceed past the dismissal stage. Your Honor, there
14 would be no need for the Court to evaluate these issues now.

15 And to the extent Equifax tries to inject other
16 arguments into their presentation as to why dismissal of these
17 and the data breach notification statutes would be improper,
18 the Plaintiffs will refer the Court to their extensive briefing
19 in appendices regarding these issues in addition to the other
20 issues Equifax raised in their argument concerning disclosure
21 of the contract claims and other claims.

22 If the Court has any questions, I would be happy to
23 answer them. But for now I will go sit down.

24 THE COURT: Thank you, Ms. Keller.

25 MS. KELLER: Thank you.

1 MR. BALSER: Your Honor, Ms. Sumner informs me I have
2 three minutes left on my time. I don't think I am going to be
3 able to make it.

4 THE COURT: I don't think you do. I think you are on
5 Ms. Sumner's time now.

6 MR. BALSER: I will be brief. Well, I think some of
7 it can come from Mr. Haskins. They can fight it out.

8 MR. HASKINS: I object, Your Honor.

9 MR. BALSER: I want to start where Ms. Keller spent
10 most of her time which is on the FCRA claims. The courts have
11 unanimously held that the FCRA does not apply in the data
12 breach context. Theft of data is not furnishing for purposes
13 of the FCRA. And there is no case that holds that the kind of
14 header information that was taken here, the names, addresses,
15 Social Security numbers, constitutes a consumer report.

16 There is no case that says the fact that you have a
17 credit card constitutes a consumer report. There is no case
18 that says whether or not you have a driver's license makes that
19 information into a consumer report. There just is no 1681(b)
20 claim here, and without a 1681(b) claim there cannot be a
21 procedures claim under 1681(e).

22 There's a little bit of bootstrapping going on saying
23 there wasn't adequate safeguarding and protections in
24 practices. But in order to make that allegation under the
25 FCRA, there has to have been an improper furnishing of a

1 consumer report; and that just hasn't happened.

2 And two other points on the FCRA claims. The point
3 that Ms. Keller made about allegations in the complaint that
4 Equifax, Inc. and EIS are alter egos and the like, it doesn't
5 matter. Even if the data had been taken from EIS as opposed to
6 Equifax, Inc., the data still wasn't furnished. It's stolen.
7 And the information that was taken still was not a consumer
8 report. It was header information.

9 So whether or not it was EIS, you know, their
10 allegations of alter ego don't get them over the hurdle of
11 1681(b). There's a reason why every single court that has been
12 faced with these kinds of allegations, and they always allege
13 that the company was negligent, could have done or should have
14 done more such that it constituted furnishing, that every court
15 has rejected it because the purpose of the statute is to deal
16 with voluntary submissions of credit information pursuant to an
17 authorized request. That's what these statutes are designed to
18 govern, not a theft by a third party.

19 Finally, on the FCRA points, it is absolutely
20 appropriate for this Court to deal with those claims on a
21 motion to dismiss. They are facially inadequate claims, and
22 they should be dismissed under 12(b)(6). There's no factual
23 discovery needed to determine that under the facts and
24 circumstances here there was no furnishing of a consumer
25 report, and those claims ought to be dismissed.

1 Very quickly I want to just address a couple of the
2 other points that Mr. Canfield made. One of them was this
3 citation of the Court to the *Braun v. Soldier of Fortune*
4 *Magazine* case. It was not in the briefing they raised today.
5 That case raised a very different issue than what we are faced
6 with. That case dealt with under what circumstances a magazine
7 can be held liable for negligently publishing a murder-for-hire
8 ad. It has nothing to do with our case.

9 The Plaintiffs argue that the Court should adopt
10 *Braun's* risk utility balancing test to find a duty here, but
11 we've got *McConnell* that says there is no duty. So it doesn't
12 help them. And even though *Braun* did cite *Wessner*, *Braun* was a
13 1992 case. And the Eleventh Circuit has since explained that
14 *Wessner* stands only for the control exception to the general
15 tort rule. And I would point that since this is a new case I
16 want to give you a new cite. This is cases they rely on. Take
17 a look at *Smith v. United States*, 873 F.3d 1348 at 1352, 2017
18 Eleventh Circuit case that cabins *Wessner* to the control
19 exception.

20 And, you know, to go back to *Wessner*, I think the
21 point -- I mean, you heard Mr. Canfield say we are not alleging
22 a failure to control under *Wessner*. And I think that ends the
23 inquiry because *Wessner*, the language in *Wessner* and the duty
24 in *Wessner* as explained by the Supreme Court in *Wessner* was,
25 and I quote, "Where the course of treatment of a mental patient

1 involves an exercise of control over him by a physician who
2 knows or should know that the patient is likely to cause bodily
3 harm to others, an independent duty arises from that
4 relationship and falls upon the physician to exercise that
5 control with such reasonable care as to prevent harm to others
6 at the hands of the patient."

7 And over time the courts, both the Georgia courts and
8 the Eleventh Circuit, have recognized that was the basis upon
9 which *Wessner* was decided was control over someone who could do
10 injury. And that is -- as we heard Mr. Canfield say, they are
11 not alleging that here, nor could they because, of course, we
12 didn't have control over the criminal hackers.

13 Just very briefly on the -- it's a pointy-headed
14 point, but I want to make the point. Mr. Canfield cited the
15 Court to the *Barnes & Noble* case for the proposition that
16 Equifax's failure to challenge Article III standing means that
17 they have actually pled cognizable injury under Georgia tort
18 law, and that just isn't so.

19 First, I would say in the *Dieffenbach* case, that
20 *Barnes & Noble* case, that case involved a specific California
21 statute in which the Seventh Circuit held that the injury
22 requirement under that statute was coextensive -- was no more
23 onerous than the Article III injury requirement. And Georgia
24 law under *Collins* requires more. In fact, the Eleventh Circuit
25 in the *Wooden v. Board of Regents* case at 247 F.3d 1262 has

1 said that whether a Plaintiff has standing is, and I quote,
2 "conceptually distinct from whether the Plaintiff is entitled
3 to prevail on the merits."

4 We have also cited the *Caudle v. Towers Perrin* case
5 which is a data breach case where the court found that the
6 Plaintiff had satisfied Article III standing but that his
7 negligence claim failed because he had not established a
8 sufficient injury under the future-risk-of-harm prong.

9 So, Your Honor, for all the reasons that we argued in
10 our briefs and in my opening argument, and for the reasons
11 stated here, we ask the Court dismiss Plaintiffs' consumer
12 complaint.

13 THE COURT: Okay. I need to take at least a short
14 break.

15 Mr. Siegel, Mr. Barnes, what's your pleasure? Do you
16 want to take a lunch break? You want to try to finish your
17 part before lunch?

18 MR. SIEGEL: I think Mr. Haskins is up next with
19 their motion on the small business claim. So starting after
20 lunch is fine so we don't break it up, but we will leave it to
21 the pleasure of the Court.

22 MR. HASKINS: Absolutely, Your Honor, whatever is
23 your pleasure.

24 THE COURT: Well, my preference would be to take a
25 ten-minute break, hear from you, take a lunch break and y'all

1 come back. But if you want me to --

2 MR. SIEGEL: That's fine too.

3 THE COURT: If you want to try to finish it all
4 before lunch, I'm willing to do it.

5 MR. SIEGEL: I think the lunch break will allow
6 Governor Barnes and I to fit into the smaller space we have
7 been assigned now, Your Honor.

8 MR. BARNES: I doubt that.

9 MR. SIEGEL: I should say allow me to fit into the
10 smaller space. So that's acceptable, Your Honor.

11 THE COURT: Okay. Well, I need to take a ten-minute
12 break. So we will be in recess for ten minutes.

13 (A short recess was taken.)

14 THE COURT: Mr. Haskins, Mr. Balser used nine minutes
15 of somebody's time. Is it you or Ms. Sumner?

16 MR. HASKINS: So he used five minutes of Ms. Sumner's
17 time and four of mine.

18 THE COURT: All right.

19 MR. HASKINS: That was bitterly negotiated.

20 THE COURT: All right. You've got 26 minutes.

21 MR. HASKINS: Thank you, Your Honor.

22 Your Honor, we're going to turn the page here a
23 little bit and talk about some different claims that have been
24 alleged in this case by a different group of Plaintiffs by the
25 same lawyers who represent the consumers. Now, these claims

1 have been filed by a handful of small businesses. They filed a
2 separate complaint. And as you can see here, we have the class
3 definition. They are seeking to represent a nationwide class
4 of businesses that have relied upon their owners' personal
5 credit to obtain financing where the owners' personal
6 information was compromised in the data breach.

7 But I think it's important, Your Honor, to understand
8 that the filing of that separate complaint doesn't mean that
9 these are separate and independent claims. In fact, they are
10 not. They are entirely derivative of the consumer claims, and
11 it's no accident that they are represented by the exact same
12 lawyers before this Court today. And I think that conclusion
13 becomes very clear if we take a look at the nature of the
14 claims that they've alleged. But it's important to see what
15 they haven't alleged.

16 First, the small business Plaintiffs don't allege
17 that any information that belonged to them, to the businesses,
18 was compromised in the Equifax data breach. That's a critical
19 point. There's no allegation that any information that
20 belonged to these Plaintiffs was actually compromised or stolen
21 from Equifax.

22 Second, the small business Plaintiffs don't allege
23 that their own financial information is at risk. In other
24 words, they are not claiming that there's a risk of some
25 business identity theft. So rather than seeking to pursue

1 claims based on injuries that might happen to them, to their
2 businesses resulting from the misuse of their information, what
3 the small business Plaintiffs ask this Court to accept is that
4 they have a potential injury that might result from the
5 potential misuse of their owners' information.

6 Obviously, those are pretty speculative claims. And,
7 of course, those business owners on which they base their
8 claims are consumers. And those consumers fall squarely within
9 the class of consumer Plaintiffs that -- the consumer
10 Plaintiffs in this case and the consolidated consumer complaint
11 that's brought on behalf of. And as a result, many, if not
12 all, of the reasons that Mr. Balser gave today for dismissal of
13 the negligence, negligence per se and the other claims that are
14 brought by these small business Plaintiffs also apply with
15 equal force to the claims of these small business Plaintiffs.

16 But, in fact, the reasons for dismissal of these
17 small business claims are even stronger. And I think it's
18 important for the Court to consider and recognize that no court
19 has ever recognized the duty or the theory of liability that
20 the small business Plaintiffs are trying to offer here.

21 And let's put that in context. Keep in mind that
22 what we have had over the last several years have been -- we
23 have had several years of data breach litigation, including
24 some in this court, all across the country that has involved
25 hundreds of millions of consumers. Yet not a single court has

1 extended liability for the compromise of that consumer data to
2 the small businesses that those consumers may also have a
3 relationship with. There's no basis for extending that
4 liability under Georgia law or any other law, and this Court
5 should not be the first Court to recognize those speculative
6 claims.

7 So rather than re-plow the ground that Mr. Balser
8 already hit this morning, what I'd like to do is take a look at
9 the claims. Of course, they largely mirror the claims that
10 have been brought by the consumer Plaintiffs. But I want to
11 focus on the defects that are unique to the small business
12 Plaintiffs. And the first of those is the fact that these
13 Plaintiffs actually lack standing to even bring these claims.

14 Now, of course, I'm sure Your Honor is very familiar
15 with the jurisdictional standard here. But just to confirm,
16 Article III standing, of course, requires an injury, requires
17 traceability and it requires redressability. And here the
18 small businesses' claims should be dismissed because they fail
19 to allege an injury in fact that's fairly traceable to the
20 conduct of Equifax.

21 Now, let's start with the injury requirement. Now,
22 to confer standing under Article III, the Supreme Court has
23 made it clear an alleged injury must be actual or imminent.
24 And also -- and this is important in this case -- the injury
25 can't be conjectural or hypothetical. And the small business

1 Plaintiffs here don't allege any actual injury, and we will
2 talk about the two types of injuries that they do allege. But
3 instead they claim that their businesses have been exposed to
4 an increased risk of harm, of future harm. But if we're
5 talking about an imminent injury, the Supreme Court has
6 repeatedly held that an imminent injury must be certainly
7 impending.

8 So let's take a look at what the Plaintiffs have
9 actually alleged and see if they meet that standard.

10 They do not.

11 What the small business Plaintiffs have alleged is
12 that their owners' data was stolen -- again, the owners' data,
13 not the small businesses themselves. And the small businesses
14 also then allege that the theft of that data causes them to
15 face an increased risk of harm to their business operations.

16 But that increased risk of harm is far different from
17 the increased risk of harm that Mr. Canfield discussed this
18 morning or that has been found in other data breach cases.
19 Rather, the risk of harm here is that their own business
20 information -- it's not that their own business information
21 will be misused, but they are at risk because their owners'
22 information will be misused. That is a step that is far more
23 remote than any court has recognized in any other data breach
24 case.

25 And then, finally, the small business Plaintiffs

1 allege that they have spent time and money specifically on
2 business credit reports and monitoring their own financial
3 accounts.

4 So the small business Plaintiffs' injuries fall into
5 two categories. They have got a risk of harm, then they've got
6 their mitigation expenses which is purchasing of a business
7 credit report.

8 So if we want to actually understand what they have
9 alleged with respect to their risk of harm requirement, I think
10 it's easiest to see this in the context of one of the named
11 Plaintiffs in the case. Here we have the business Plaintiff
12 Martin's Auto Repair which is a Georgia partnership alleged in
13 the complaint. And the complaint says that Martin's Auto
14 Repair relies on the personal credit of Teresa Sue Martin and
15 William Marvin Martin, Jr., individuals whose personal
16 information was compromised in the Equifax data breach to
17 obtain and maintain its own credit. The breach has, thus,
18 jeopardized not only their personal credit but also the
19 creditworthiness and continued operations of Martin's Auto
20 Repair.

21 So there we see the derivative nature of their claim.
22 But, more importantly, what we see is that Martin's Auto
23 doesn't actually allege any actual injury, only jeopardy. And
24 it's jeopardy to their credit. But for that jeopardy to occur
25 -- we have to unpack now a little bit -- let's see what that

1 risk actually is. And what we see is it's a series of events
2 that would result in the injury, not an actual injury.

3 So the first step that would have to occur is the
4 thief would have to use Ms. Martin's stolen information from
5 Equifax to open a fraudulent account in her name. And, of
6 course, the thief could have obtained that information from a
7 variety of other sources, including many of the other data
8 breaches that occurred. And, in addition, there are many uses
9 that thieves and fraudsters have to information that is stolen
10 of the type that was stolen from Equifax in this case. It's
11 not only stolen for the purposes of opening a fraudulent
12 account in someone's name.

13 And, interestingly enough, this is actually the event
14 and the risk of harm that Mr. Canfield and the consumers are
15 claiming. All of the other events that we are going to look at
16 here, these are all additional events that would have to occur
17 before the small business Plaintiffs in this case could
18 actually suffer an injury. So let's see what those other
19 events are.

20 Well, the fraudulent account reported would have to
21 be reported on Ms. Martin's credit file before that fraud was
22 detected. And, of course, there are many safeguards in place
23 to try to ensure that that fraudulent information is not
24 reported.

25 In addition, there would have to be a negative impact

1 on Ms. Martin's personal credit score before the fraud is
2 detected. Once again, the mere opening of a new account,
3 particularly if the account is not unpaid, is unlikely to have
4 any impact on their credit score, much less a negative.

5 Then Martin Auto would have to apply for a loan using
6 Ms. Martin's credit before that credit is detected. And then,
7 finally, the creditor would have to deny Martin Auto credit or
8 offer it on less favorable of terms again before that credit is
9 -- that fraudulent account was detected.

10 So what we have here is a bunch of things that have
11 to happen before an injury could occur. There's no allegation
12 that any of these events have actually occurred with respect to
13 the Martins or with respect to any of the Plaintiffs in the
14 case. In fact, that's all we have is speculation which means
15 that all of these injuries are hypothetical. And I think it's
16 very easy to see that these injuries are so hypothetical when
17 we see what the Plaintiffs don't allege.

18 They don't allege that any small business owner's
19 data was actually misused. They don't allege that any of the
20 owners actually had their identity stolen. There's no
21 allegation that any fraudulent accounts were opened using the
22 stolen owner's data, no allegation that any owner's credit
23 score or credit rating has declined, no allegation that any
24 small business Plaintiff has even applied for credit, Your
25 Honor. And, finally, there's no allegation that any small

1 business owner's -- I'm sorry -- Plaintiff's application for
2 credit was declined. In other words, what we have is a bunch
3 of events that would have to occur and have not occurred before
4 an injury would exist.

5 So what we have is just a hypothetical future injury,
6 not an actual one. And as the Court, I'm sure, is aware, while
7 the Supreme Court has recognized that some threatened injuries
8 are sufficient to confer an actual imminent injury, not all of
9 them are. In *Clapper*, the Supreme Court made it clear that
10 mere allegations of possible future injury just aren't enough;
11 and the reason why that's the case is because that's not
12 imminent. In fact, what the Supreme Court has told us is that
13 an imminent injury has to be certainly impending.

14 Given the assumptions that we have to make to
15 identify any possible future injury for the small business
16 Plaintiffs' claims, we certainly can't describe them as
17 imminent or certainly impending. And if we go through their
18 claims, in fact, you cannot describe any of these events or the
19 damages that they're seeking in this case without using the
20 word "if" -- if this happens, if the business depends on the
21 owner's creditworthiness, if the owner's creditworthiness has
22 been negatively impacted, if the creditor denies it.

23 Well, I would suggest to you, Your Honor, that if you
24 can only describe your injury by using the word "if" so many
25 times it's not certainly impending. It's not an injury in

1 fact. It's precisely the type of conjectural, hypothetical
2 injury that the Supreme Court has said in *Spokeo* and over and
3 over again is not sufficiently concrete to create an injury in
4 fact.

5 So risk of harm is not enough. Let's take a look at
6 the other alleged injury that they have which is the money that
7 they have allegedly spent on mitigation expenses. Here we have
8 again the allegation in the complaint from Martin's Auto
9 Repair, and it says that Martin's Auto Repair has reasonably
10 incurred costs in the form of a business credit report and
11 devotion of resources to monitoring its financial accounts
12 based upon the substantial risk of harm from the breach.

13 Now, the Supreme Court has recognized that mitigation
14 -- and some courts have recognized that mitigation expenses can
15 confer standing under certain circumstances, but it's really
16 only if there is a substantial risk that that threatened injury
17 would actually occur. What's important -- and the Supreme
18 Court -- I'm sorry -- the Seventh Circuit has made this clear
19 -- is even in the *Neiman Marcus* case and the other cases the
20 Plaintiffs have cited that the mitigation expenses don't
21 qualify as actual injuries if the harm is not imminent. And
22 what we don't have here is any allegation that there was an
23 imminent harm. What we have is speculation that it could occur
24 instead. That's not imminent.

25 In fact, as we talked about earlier, we've got all of

1 these events that have to occur before the injury would happen.
2 You can't describe these injuries as imminent. You can't
3 describe them as certainly impending. And there's no
4 substantial risk that they are going to occur. As a result,
5 they don't support Article III standing or an injury
6 requirement.

7 And the final point I want to make on the mitigation
8 expenses injury that they are arguing is that the expenses that
9 the small businesses claim here actually would not prevent the
10 threatened harm that they allege. Because keep in mind that
11 the only out-of-pocket expense that they allege is purchasing a
12 business credit report, but the business credit information was
13 not what was stolen in the breach. The small businesses'
14 financial information is not what was taken from Equifax.
15 Rather, it was the owners' personal information that was taken
16 in the breach.

17 So as a result, it's the misuse of the owners'
18 information that the small business Plaintiffs should be
19 monitoring and should be tracking if they are, in fact,
20 concerned about this risk of harm. If you recall our slide
21 earlier, what we were concerned about is how the thief was
22 going to use the owners' information. That's what they should
23 be monitoring. But spending money on a business credit report
24 and devoting time to monitoring the businesses' accounts is not
25 going to protect or prevent misuse of the owners' personal

1 credit.

2 So as a result, those mitigation expenses are not
3 going to prevent the threatened injury and they're not going to
4 convert those voluntary expenses that they incurred into an
5 actual injury that confers Article III standing on these
6 Plaintiffs.

7 Now, even if the Plaintiffs, the small business
8 Plaintiffs, could point to an injury, of course, that injury
9 has to be fairly traceable to Equifax's conduct here at the
10 data breach. But it's important to keep in mind that when
11 examining this issue of traceability that a Plaintiff can't
12 rely on speculation about the unfettered choices made by
13 independent actors not before the Court to demonstrate
14 traceability. That's what the Supreme Court told us in
15 *Clapper*.

16 But to tie the small business Plaintiffs' alleged
17 risk of harm here to the Equifax breach, the Court has to make
18 a variety of assumptions about persons or entities that aren't
19 in front of the Court. Those would include the hacker, what
20 did the hacker do with the information; did they give it to the
21 thief; what did the thief do with the information; what did the
22 creditor do that the thief defrauded to open up a fraudulent
23 account; and the business owner themselves, what steps did they
24 take to prevent the misuse of their information or detect that
25 that information had been misused and was appearing on their

1 credit report before they went out and allowed the business
2 that they owned to apply for credit in their name; and then,
3 finally, the small business Plaintiffs' creditor.

4 So we have got all these independent actors. And if
5 the small businesses ultimately down the road ever suffer any
6 injury, it's attributable to those -- the actions of those
7 individuals, not Equifax.

8 So in short, Your Honor, there's no Article III
9 standing here. The Plaintiffs, small business Plaintiffs,
10 don't allege any actual injuries to support Article III
11 standing. They don't plausibly allege that there's any
12 certainly impending injury or an imminent injury, much less a
13 substantial risk of one that would convert the voluntary
14 expenses that they've incurred into damages. And those
15 injuries, even if they existed, they're not plausibly traceable
16 to Equifax's conduct.

17 Now, I'd like to turn just briefly and discuss the
18 specific causes of action that the small business Plaintiffs
19 have alleged. Now, even if they had standing to pursue these
20 claims, what they don't have is a duty under Georgia law that
21 was violated.

22 Now, as Mr. Balser explained, if *McConnell III* is the
23 law in this state and there's no duty to safeguard a person's
24 PII under Georgia law, clearly these small business claims
25 would also fail. They are derivative of those consumer claims;

1 but, in fact, they are even more remote because they would have
2 to show that there was a duty to protect a third party's PII.

3 So in that regard, what the Plaintiffs are really
4 asking this Court to do is go far beyond what the Court
5 rejected in *McConnell*. And as a result, the outcome of
6 *McConnell* really doesn't even dictate the result in this case
7 even if it were overturned because even if the Supreme Court
8 reversed in *McConnell* then the small business Plaintiffs'
9 claims are still going to lack an actual duty. They are going
10 to fail because there's no recognized duty to any third party
11 like them.

12 No court, and especially no Georgia court, has ever
13 recognized a duty owed to a small business to safeguard the
14 personal information that belongs to the owners of that
15 business. That case just simply doesn't exist. And as the
16 Court, I'm sure, is aware, the only way to create a duty under
17 Georgia law is either there's a statute or there's a case that
18 defines that duty.

19 In fact, the Plaintiffs have not even attempted to
20 cite to a statute or a case here that imposes that duty.
21 Rather, what they have done is argued that the harm here should
22 have been foreseeable.

23 Now, the concept of foreseeability is important in
24 Georgia tort law, but it certainly is not going to save their
25 negligence claim here. Under Georgia law, foreseeability

1 doesn't create a duty. We can't create a duty of care simply
2 because a potential harm was foreseeable. Instead, under
3 Georgia law, foreseeability is going to help us define the
4 parameters if a duty exists.

5 But we have cited the *CSX Transportation* case in our
6 briefs, in our reply brief, to make that point clear. But I
7 think it's an important concept for the Court, particularly
8 with respect to these small business claims. Foreseeability is
9 going to limit the duty, but it's not going to create one. But
10 that's exactly what these Plaintiffs are trying to get the
11 Court to do is expand the duty into areas that it's never been
12 taken before.

13 THE COURT: Mr. Haskins, you have got five minutes of
14 your time left.

15 MR. HASKINS: Thank you.

16 And then, of course, these Plaintiffs also tried to
17 rely on the *Wessner* case. But as Mr. Balser pointed out, that
18 only applies where the Defendant exercised control over the
19 person that caused the harm. As we talked about earlier, there
20 are many other individuals here that would have caused harm
21 besides the Plaintiffs -- besides Equifax itself and the
22 allegations that relate to that.

23 And then, finally, with respect to the negligence
24 claim, the Plaintiffs do not allege a compensable injury. And
25 we just went through those injuries and the fact that they

1 didn't satisfy Article III standing requirements, and what I
2 think is important and significant is that the bar is actually
3 lower for alleging injury sufficient to pass Article III than
4 it is to support a negligence claim under Georgia law. Or said
5 another way, the bar is higher for these Plaintiffs to
6 establish a negligence claim under Georgia law even if they had
7 standing. And they don't.

8 And we have cited these cases. And Judge Story in
9 his decision, he acknowledged, "No Georgia court has ever
10 adopted a theory of liability premised on mere increased risk
11 of suffering from a future injury." That's exactly what the
12 Plaintiffs have alleged in this case. That's their only real
13 injury.

14 And then Georgia courts don't recognize prophylactic
15 costs that are incurred to mitigate against future harms.
16 That's important because the costs in *Collins* in the recent
17 Georgia Court of Appeals decision were exactly the costs they
18 have alleged here which is credit monitoring expenses. That's
19 not an injury under Georgia law.

20 So the negligence claim fails on that level. The
21 negligence per se claim fails for the same reasons that
22 Mr. Balser covered. There's no duty under Section 5 of the FTC
23 Act. And it also fails, of course, for the same reasons that
24 the negligence claim fails. There's no facts alleged showing
25 proximate cause and no actual damages.

1 Then let's turn briefly to the Fair Business
2 Practices Act claim. Again, the act itself does not impose a
3 duty to safeguard personal identification information. But
4 keep in mind that here the duty that they are alleging is even
5 more remote. It would be imposing a duty on small businesses
6 to safeguard their owners' information. That's not what the
7 act covers.

8 In addition, they failed to plead that they relied on
9 any misrepresentation by Equifax. And, of course, they
10 couldn't. That's a required element of a claim under the Fair
11 Business Practices Act. But these small business Plaintiffs
12 don't allege they gave any information to Equifax, much less
13 that they gave it to them in reliance on a misrepresentation.
14 And, more importantly, it wasn't their information that was
15 stolen in the first place. So that -- and this claim also
16 fails because they have no damages, and we have gone through
17 those.

18 Then, finally, Your Honor, they had a claim for
19 attorneys' fees. Of course, that should be dismissed. There's
20 clearly a bona fide controversy here. And they didn't allege
21 that Equifax acted in bad faith in any way and, in fact, nor
22 could they.

23 So for all of those reasons, Your Honor, the small
24 business claim should be dismissed.

25 THE COURT: Y'all want to take a lunch break?

1 MR. SIEGEL: That would be fine, Your Honor.

2 THE COURT: All right. 1:45?

3 MR. BARNES: Fine.

4 MR. SIEGEL: That sounds great. Thank you.

5 THE COURT: Court's in recess for lunch until 1:45.

6 (A lunch recess was taken.)

7 THE COURT: You are next, Mr. Siegel.

8 MR. SIEGEL: I am, Your Honor. Good afternoon. Norm
9 Siegel on behalf of the consumer Plaintiffs and specifically
10 the small business Plaintiffs for purposes of this argument.

11 Your Honor, I think Mr. Haskins gave a fair overview
12 of the claims brought on behalf of the small businesses. We do
13 allege a class of small businesses like Martin's Auto Repair
14 referenced by Mr. Haskins that rely on the personal
15 creditworthiness of their owners to obtain credit. The class
16 does also define who is not every business with an owner that
17 depends on credit. Those are only owners like Ms. Martin where
18 their individual information was compromised in the Equifax
19 data breach.

20 So you have Ms. Martin on the one hand, one of the
21 148 million people who had their confidential information
22 compromised as a result of the breach, and a business on the
23 other hand that actually has quite a close nexus to Ms. Martin.
24 Both are harmed. The first complaint we filed, the
25 consolidated complaint at 374 in the docket, is on behalf of

1 those individuals. The second complaint we filed at 375 is, of
2 course, on behalf of these businesses.

3 These claims were alleged in original cases that were
4 filed in this MDL, and Your Honor placed those claims on behalf
5 of the small businesses under the consumer track. And here we
6 are. You assigned us to evaluate and bring those claims if we
7 thought they were appropriate, and we did. And there was good
8 reasons to put these small business claims in the consumer
9 track.

10 The claims of these small businesses are tethered
11 very closely to the individuals who had their information
12 compromised. And there's indeed a very close nexus between the
13 harm to the individuals and the harm to the businesses. But
14 those businesses are separate entities with separate standing
15 that have separate damages and, therefore, separate claims and,
16 therefore, they are in a separate complaint brought on behalf
17 of the -- under the consumer rubric in this MDL.

18 THE COURT: Well, let me ask you, Mr. Siegel. So
19 when you take this job, you have to take it and with a vow of
20 poverty. And so when my wife recently wanted to replace her
21 19-year-old car with not a new one but a newer one, she had had
22 -- she had frozen her credit. So I had to sign the application
23 to get a loan to buy the car.

24 Now, she has got a close nexus to me. She relies on
25 my credit. But does that mean if my credit information is

1 stolen she would get to sue?

2 MR. SIEGEL: Yeah, it's a fair question, Your Honor.
3 And I think the best thing I can do is direct your attention to
4 two things. One is how we define the original complaint which
5 is it is only those people because we need to be able to
6 identify them with certainty that Equifax tells us are in the
7 148 million individuals who were breached --

8 THE COURT: But then how do you identify the
9 companies?

10 MR. SIEGEL: Right. So this is a class certification
11 issue, so I would suggest it's a little bit putting the cart
12 before the horse. But the way we have defined it is one is we
13 know who those individuals are because they are a subset of 148
14 million. They own businesses that rely on those individuals
15 for credit. So that is how we will be obligated to establish a
16 class when we get around to class certification.

17 But I do think it's important -- your question does
18 raise what I think is very important, something to be looked at
19 closely: Okay. What is not the nexus between Judge Thrash and
20 his spouse for purposes of the complaint, but what do we do,
21 what is the nexus between individuals and these businesses that
22 alleged harm in these underlying complaints in the MDL.

23 And I direct --

24 THE COURT: When my son wanted to rent an apartment
25 in New York City, they wouldn't rent it to him unless I

1 cosigned and they pulled a credit report on me.

2 MR. SIEGEL: Right.

3 THE COURT: So there you are another, you know,
4 example of someone who may be depending on my credit. But
5 would he be able to sue if my credit information was stolen?

6 MR. SIEGEL: Your Honor, we will certainly consider
7 expanding the class definition when we get to class
8 certification. We didn't think that was prudent based on the
9 original claims brought in this MDL.

10 THE COURT: That's a very good response, Mr. Siegel.
11 I wouldn't have been smart enough to have thought of that on my
12 feet.

13 MR. SIEGEL: I don't want to take too much credit for
14 that.

15 I do think that the key here from our perspective
16 when you assigned us to evaluate these claims is really
17 contained in a fairly narrow part of the complaint. So if you
18 look at roughly paragraphs 190 to 210 in the small business
19 complaint, it goes through in detail why we were convinced that
20 this was worthy of bringing to the Court's attention and
21 seeking to bring a case on behalf of these small businesses.
22 And let me just summarize them quickly because I do have
23 limited time, and I know the governor is eager to come in
24 behind me here.

25 So the facts as we have alleged them that must be

1 taken as true here is that these businesses do have a very
2 close nexus to the individuals that own them. In paragraphs
3 190 or so, we talk about the fact that the vast majority of
4 small businesses in the United States depend on the
5 creditworthiness of their owners, including personal guarantees
6 that Your Honor is familiar with for the businesses they own.
7 So when Ms. Martin wants to go buy mufflers for Martin's Auto
8 Shop, she obviously needs to extend -- the business needs to
9 extend -- secure credit, and that credit is secured based at
10 least in part on Ms. Martin's creditworthiness.

11 So when the breach happened, the small business
12 committees of both the Senate and the House issued a report
13 under Senator Shaheen's letterhead. And maybe I can turn to
14 the Elmo. It might be the quickest.

15 And what Senator Shaheen said was flagged
16 immediately, this issue that the availability of business
17 credit for small business owners is inextricably tied to their
18 personal credit score, and further expressed "grave concern
19 about the impact of the breach on small businesses." So it was
20 clear to us post-breach that lots of people, including these
21 Senate House committees, were very concerned about the impact
22 not only on those 148 million individuals but also on these
23 small businesses because the credit of those businesses was
24 tied to their owners.

25 They go on to explain that the impact on these

1 businesses would be impactful, less favorable credit terms for
2 these businesses, higher interest rates, reduced cash flow,
3 jeopardizing collateral and ultimately putting these small
4 businesses at risk. And you can see these -- this is the cover
5 page to the communication, the headline there that identity
6 theft is especially devastating for small business owners and
7 the availability of capital is tied to the personal credit
8 score. So that is the nexus that convinced us that this was
9 worthy of the Court's time and our time in litigating this case
10 on behalf of these small businesses which had these distinct
11 injuries.

12 Now, it's not just Congressional committees and small
13 business organizations out there that recognized and
14 appreciated this nexus. Equifax itself has for sometime
15 acknowledged and marketed products based on this nexus between
16 the credit of a small business and the credit of its owners.

17 Paragraph 201, for example, we talk about how Equifax
18 acknowledged in a white paper that the credit histories of
19 business owners are "an essential element for understanding the
20 business's credit risks." In paragraph 202, Equifax actually
21 sells a business credit score -- I'm sorry -- business credit
22 report like an individual credit report. This business credit
23 report includes information on the business's owners for "the
24 deepest level of insight into the validity, financial stability
25 and performance of the business."

1 Both before and after the breach, they stole
2 something called a business principal report. And, Your Honor,
3 this was another significant fact for us that we think is
4 compelling here and hopefully addresses the Court's question at
5 least with respect to these small businesses that Equifax
6 itself was selling these products recognizing this nexus. And
7 this is in paragraph 204. I want to read it because I do think
8 it captures and answers a lot of those questions.

9 What Equifax is telling people, at the top there it's
10 a business principal report. The subheading is Thoroughly
11 Assess Risk With a View Into Creditworthiness of Business
12 Owners and Principal Guarantors. So when Ms. Martin calls up a
13 muffler manufacturer to get mufflers for Martin's Auto Shop,
14 Equifax is telling the muffler manufacturer, you know, you
15 should check this business principal report because that is
16 going to tell you in Equifax's words, if you go to the bottom
17 paragraph here, they draw on this information so you can gain
18 comprehensive information about the credit history of a
19 business principal. Plus, you are alerted to potentially
20 fraudulent information about the individual that might require
21 further verification and whether the individual has a higher
22 potential for late payments.

23 So in that very communication that Equifax is making
24 to the muffler manufacturer and others, it is tethering this
25 exact credit of the business to that of the individual and

1 telling both Ms. Martin who owns Martin's Auto Shop, Martin's
2 Auto Shop as an entity, and the muffler manufacturer that they
3 all need to be concerned about Ms. Martin's credit.

4 They also sell -- this is in paragraph 205 --
5 something called a business risk score which they say evaluates
6 the credit of businesses based on the credit of the owner. And
7 before and after the -- I'm sorry. After the breach, at the
8 same time Equifax -- and Mr. Canfield talked about it; it's in
9 our complaint. But at the same time Equifax was telling people
10 to take protective action to get -- make sure you check your
11 credit score, to freeze your credit, to monitor your credit.
12 Commentators in this -- in the small business community were
13 telling folks it's essential that small businesses do it too.

14 And so, as we allege in paragraph 209, these business
15 credit reports which sold for a hundred dollars were the types
16 of things that small businesses purchased to make sure that to
17 the extent that their credit was under attack because of a
18 fraudulent transaction they would be able to see that in how
19 Martin's Auto Shop was looking to their vendors like the
20 muffler manufacturer. And so Equifax was well aware of what
21 Senator Shaheen put in her letter that there is a very close
22 relationship between these two, the owner and the business,
23 that the business would have independent harm, and Equifax was
24 profiting based on that relationship.

25 So all these facts in our view, Your Honor, we

1 believe this easily for purposes of standing, which is the main
2 argument advanced by Mr. Haskins this morning, it was
3 completely foreseeable that this breach would not only harm
4 these consumers but also that small businesses would spend
5 money to monitor their credit.

6 So let me just quickly speak to standing, and then I
7 am going to turn it over to the governor. The test under
8 *Clapper* is whether there is a substantial risk of harm which
9 may prompt Plaintiffs to reasonably incur costs to mitigate or
10 avoid that harm. And that's what I hope we just demonstrated,
11 that there was a substantial risk of harm both based on the
12 acknowledgment of everybody as alleged in the complaint that
13 these two things are related and that the fact that these
14 products were out there, including from Equifax inviting
15 businesses to buy monitoring and other products related to this
16 exact harm.

17 Once you get a substantial risk of harm which may
18 prompt these businesses to reasonably incur costs, and that's
19 what we allege that these named Plaintiffs have done, all of
20 the other series of improbable events that were in slide -- I
21 can't read it -- this one, these are -- these if's that
22 Mr. Haskins said, those are really questions of fact. And once
23 that test is made -- once that test is met, that substantial
24 risk of harm which prompts Plaintiffs to reasonably incur
25 costs, you've satisfied standing both in this circuit and

1 really every other circuit who have considered it.

2 To borrow from *Home Depot*, the concept that
3 substantial risk plus mitigation costs equals injury in fact
4 for Article III, the quote there was, "Any cost undertaken to
5 avoid future harm from the data breach would fall under
6 Footnote 5 of *Clapper*, specifically as reasonable mitigation
7 costs due to a substantial risk of harm." And we think the
8 factual allegations we have in our small business complaint are
9 entirely consistent with meeting that standard.

10 I want to say just one thing about duty as it relates
11 to the small businesses. Mr. Haskins raised the CSX case a
12 couple of times, I think in slides 22 and 24. And it's
13 throughout their briefing. And I read that case again last
14 night, and I just want to comment on it briefly.

15 CSX was the Georgia Supreme Court trying to figure
16 out whether folks outside of the CSX facility could sue CSX if
17 they were exposed to asbestos from people coming and going from
18 the facility. So these were not workers. These were people
19 outside the facility.

20 And what the court aid is we are going to draw the
21 line in duty and foreseeability at the gates of this facility
22 because CSX isn't out there sprinkling asbestos over the
23 community outside of its factory. And, therefore, we're going
24 to say that if somebody came into contact with a worker, got
25 asbestosis, we are going to draw the line and say there's no

1 duty to that person.

2 What we have here is so much different. Based on
3 these factual allegations, everybody knew, including most
4 importantly Equifax, that these small businesses, they're in
5 the factory. Right? They have the same exposure as their
6 owners as it relates to the harm from this data breach. And,
7 therefore, there is a duty owed. They were foreseeable victims
8 of this breach and why we think this case should proceed beyond
9 a motion to dismiss.

10 Your Honor, I don't have anything further unless Your
11 Honor has questions. I'm going to use whatever time I have
12 remaining to hand off to the governor.

13 THE COURT: All right, Mr. Siegel.

14 MR. SIEGEL: Thank you, Your Honor.

15 THE COURT: Governor Barnes?

16 MR. BARNES: How long did he leave me?

17 THE COURT: He left you 12 minutes.

18 MR. BARNES: Oh, that's good.

19 MR. SIEGEL: That's what I promised the governor.

20 MR. BARNES: Your Honor, you know, I have listened to
21 all of these esteemed lawyers all day here and I've listened to
22 them the last few months. One of the things I try to teach
23 young lawyers that come out to practice with me is use a little
24 common sense and, even more, use the common law because the
25 common law is really common sense over the centuries.

1 Now, let me -- as you know, I drive an old, beat-up
2 pickup truck, a Ford pickup truck. And let's assume that I
3 decided that I wanted to pretty it up a little bit and take
4 some of those dents out of it and I took it to a body shop down
5 there. But at this particular body shop they left the garage
6 door open and the gate open out there. And not only that, the
7 police had been by to see them two or three times and says you
8 better close that garage door, you better close that gate
9 because somebody's going to steal the cars in there. And the
10 body shop owner says, Oh, don't worry about that. And then
11 somebody came and stole my truck, an unknown person, a thief.

12 Would that body shop owner be responsible for my
13 truck?

14 Of course, he would because he did not use ordinary
15 diligence in looking after the property that was entrusted to
16 him that was mine. Under my esteemed opponents' argument, you
17 could be responsible and I could recover for stealing my truck,
18 but I couldn't recover for the most precious and personal
19 things that I have -- my name, my information, my credit, my
20 health. All of that information that was entrusted to them,
21 unlike the poor fella that's running the body shop, could not
22 be recovered. And that just strains credibility, and it
23 strains common sense.

24 And, in fact, if Equifax had been in the body
25 business, they not only left the door open and left the gate

1 open; they put a sign on the expressway that says, "Next exit
2 if you want to steal Roy's truck."

3 And that is absolutely ridiculous. There is a duty
4 when you have the care of somebody else's most precious
5 information.

6 Now, what's the other thing in common law in Georgia?

7 Andrew Jackson Cobb was a justice of the Supreme
8 Court. He served from 1897 to 1907, ten years. He wrote a
9 case, and it's been overlooked, and it's not briefed on either
10 side in my view to its full extent. It's called *Pavich*, or
11 *Pavesich* some of them call it, *versus New England Life*
12 *Insurance Company*. It was the first case in the country to
13 recognize that there was a right of privacy but also a right of
14 confidentiality, that is, in your own information.

15 The facts of it were they took a picture of old
16 Pavich. New England Life did. And they put it in one of their
17 advertisements, and he sued them. He says you didn't have my
18 permission to take -- even though he is in the public, you
19 didn't have permission to use my picture. And the Supreme
20 Court of Georgia in a unanimous decision later said that was
21 the first case and what he based the right of action on and
22 confidentiality and privilege. They said, yes, there's a cause
23 of action there.

24 Now, if you can't take my picture without some duty
25 being breached, then how can you take my information or be so

1 negligent in using my information that others could?

2 That is -- boiled down to everything we have heard
3 today, everything we have heard today, that is the essence of
4 the case. And when you have a duty that's been established and
5 you have a breach, the law in Georgia says -- in fact, there's
6 a code section out of it -- you know, Georgia codifies
7 everything. If a case will stand still for five minutes, it'll
8 be codified. They've got -- there's a statute that says the
9 law presumes damages from a breach of a duty -- presumes
10 damages.

11 And that's the reason we have nominal damages. They
12 are part of general damages, that is. Nominal damages are part
13 of general damages. If you can't prove it with specificity,
14 the jury -- you know, the jury is the ultimate one that
15 protects us all -- the jury can award nominal damages.

16 Now, I'm sorry there's 148 million of them and they
17 say it may cost us 14 billion dollars. But you did it, and you
18 knew that you were at risk for it.

19 Now, the last thing I want to talk about just as a
20 little bit is, you know, I've been reading a lot this week
21 about lying to Congress. You know, we've sent a fella off this
22 week for three years, a lawyer, because he lied to Congress.
23 And I have listened to all the lawyers up here say there is no
24 duty, Equifax had no duty.

25 This is what their CEO acting in the scope of his

1 employment told Congress: "We at Equifax clearly understand
2 that the collection of American consumer information and data
3 carries with it enormous responsibility to protect that data.
4 We did not live up to that responsibility."

5 Now, certainly Mr. Smith didn't lie to Congress.
6 Certainly he didn't expose himself up there to being locked up
7 with Michael Cohen. Certainly he didn't go up there and tell
8 them, listen, you know, we had this duty, and then come into a
9 courtroom with his lawyers and then say no duty.

10 Can you imagine what Congress would have done if the
11 same arguments had been made or the same statements had been
12 made before Congress that have been made in this courtroom by
13 his lawyers?

14 They would have skinned him alive.

15 So what we have here is nobody doubts there's a duty.
16 Common sense tells you there's a duty. John Doe has a duty at
17 the body shop on my truck. And they had legal possession of
18 one of -- my property. And they trespassed on it, trespassed
19 on the case. They didn't preserve it. And they should be held
20 accountable before that jury.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Governor Barnes.

23 All right. Who wants to follow that?

24 MR. BALSER: I think I might need some more time from
25 Mr. Haskins.

1 MR. HASKINS: Your Honor, he has already said it had
2 to be somebody with common sense; so that excludes me.

3 I think I have two minutes. I will try to make it
4 very brief, Your Honor.

5 THE COURT: All right, Mr. Haskins.

6 MR. HASKINS: First, with respect to the small
7 business claims, let's take Governor Barnes's example. What
8 the small business Plaintiffs are alleging, Your Honor, is not
9 just that the truck was stolen. What they are really
10 contending is that Governor Barnes's son after the truck was
11 stolen has a claim because he can't deliver watermelons this
12 summer from his business. And as Your Honor pointed out, if we
13 adopt the theory that the small business Plaintiffs are trying
14 to get this Court to adopt, it would expand liability beyond
15 any reasonable bounds.

16 That's what the Georgia Supreme Court has told us
17 over and over again you can't do. We can't have this unlimited
18 series of Plaintiffs. There's what foreseeability does.
19 That's what the scope of duty does. That's what the CSX case
20 and the Georgia Supreme Court said in that case: We have got
21 to cut it off somewhere, and we are going to cut it off at the
22 inception of when the duty exists.

23 With respect to what Mr. Siegel was talking about, he
24 put up this information about these business principal reports
25 that Equifax says. There are three important things to keep in

1 mind about that, Your Honor. Number one, not a single business
2 Plaintiff alleged that they purchased a business principal
3 report. That's really all you need to know. There's no
4 allegation in the complaint that they even purchased that
5 product.

6 Second, there's no reason why they should have. The
7 business principal report is not a credit monitoring service
8 that's provided to businesses. Rather, it's a tool that
9 commercial businesses use to decide do I want to do business
10 with a third party. I don't buy it on myself. I buy it on
11 someone who I want to do business with them.

12 Third, and this is probably the most important, Your
13 Honor. To the extent there's any information, whether it's in
14 a business principal report or a consumer disclosure that's
15 provided to a consumer or a credit report about -- if there's
16 negative or fraudulent information on that credit file about a
17 business owner, if they have an injury, it belongs to the
18 business owner, not to the business. These small business
19 claims are simply consumer claims masquerading as business
20 claims, and we shouldn't be fooled by the disguise.

21 Thank you.

22 THE COURT: Ms. Sumner, are you next?

23 MS. SUMNER: I am, Your Honor.

24 Ms. Sewell, if we could switch over. Thank you.

25 MR. CANFIELD: Your Honor, can you give us just a

1 second to vacate our spots so the financial institution lawyers
2 can come up?

3 MS. SUMNER: Without starting the clock, Your Honor.

4 (Pause.)

5 THE COURT: I think they're ready, Ms. Sumner.

6 MS. SUMNER: Thank you, Your Honor.

7 I would like to address Equifax's motion to dismiss
8 the financial institution Plaintiffs' consolidated amended
9 complaint. And, Your Honor, I'd like to begin with what this
10 case is not about because this case is not about payment cards.
11 Unlike *Home Depot*, *Arby's* and other financial institution data
12 breach cases, this case except for a very small portion of it
13 has nothing to do with stolen payment cards.

14 And, of course, we recognize that Your Honor was very
15 involved in the *Home Depot* case, as were a number of folks on
16 both sides of the "v" here. But the circumstances are quite
17 different. This is a very different legal theory and very
18 different factual allegations. And, in fact, half of the named
19 financial institution Plaintiffs don't even allege that they
20 issued payment cards that were impacted by the Equifax breach.

21 So what does this mean as a result of what they are
22 alleging?

23 Unlike any prior data breach claim, the financial
24 institution Plaintiffs are seeking recovery for the alleged
25 loss of information that does not belong to them but belongs to

1 consumers. So this is the most far-out theory of the day, Your
2 Honor. As we go through this process, you will see with the
3 exception of a very limited set of payment cards here of about
4 200,000 there's nothing that relates to payment cards.

5 So, essentially, there is no hook here. The
6 Plaintiffs have a hat. They have tried to hang it on
7 something. But they have thrown it up against the wall, and
8 the hat has fallen to the floor.

9 So now they have created a very boundless theory of
10 liability, and they allege that they are damaged because they
11 relied on the consumer information to conduct their business.

12 So what does that mean with their theory?

13 It means that any company, let's just say Company A
14 that relies on consumer information, would be entitled to bring
15 an action against any company, Company B, that suffers a data
16 breach which impacts the customers of Company A.

17 So if you take that out, what does that mean in other
18 contexts?

19 That means that a school that relies on student
20 information would have a claim against a company where there
21 was a data breach that involved the information of those
22 students, or it could mean an airline that had to verify
23 passengers. If there was a data breach that involved the
24 consumer PII of those individuals, then they would have a
25 claim. Or maybe it's a state government that uses information

1 to verify driver's licenses or tax information or even an
2 online merchant that verifies consumers using information that
3 was breached by another company. By their theory, it would
4 practically increase this liability to any company that has a
5 data breach involving consumer information. It has no bounds.

6 In addition, the financial institution Plaintiffs
7 include no specific factual allegations to support their
8 claims. Not a single named financial institution Plaintiff
9 alleges a fraudulent account was opened because of the data
10 breach. They don't allege a fraudulent charge was made because
11 of the data breach. They don't identify one specific
12 communication to its customers as a result of the data breach
13 or one marginal additional dollar spent on data security as a
14 result of the data breach.

15 This is vastly different than the other financial
16 institution cases, including the *Home Depot* case. As Your
17 Honor may remember, the allegations there involved millions of
18 impacted payment cards. And there were allegations that those
19 cards were posted online for sale and that the cards that were
20 used for purchases at *Home Depot* were also subject to numerous
21 fraudulent charges.

22 There are no such allegations in this case. At most,
23 the Plaintiffs provide some very generic allegations, for
24 example, discussing that they voluntarily investigated the
25 potential impact of the Equifax data breach, that they

1 voluntarily monitored their customers' accounts and that they
2 generally communicated to their customers after the data
3 breach. It is facially inconceivable that all 46 named
4 financial institution Plaintiffs suffered that exact same harm.

5 Let's start with standing, and you've heard a good
6 bit about standing. But let's focus on what it means to the
7 financial institution Plaintiffs. And we're going to cover the
8 legal standard here, and what I will focus on are two factors:
9 One, the Plaintiffs' burden to show that it suffered an injury
10 in fact and that it's fairly traceable to the challenged
11 conduct of the Defendant as established by *Spokeo*.

12 Let's start with the fact that the financial
13 institution Plaintiffs did not allege sufficient plausible
14 factual allegations in order to demonstrate a cognizable injury
15 in fact. To do that, they must show that its injury is
16 concrete and particularized and actual or imminent, not
17 conjectural or hypothetical. So here the alleged harms are, in
18 fact, speculative and conjectural. They haven't alleged that
19 any fraud has actually occurred, and they haven't alleged any
20 facts about costs that they had to incur.

21 And no court has ever recognized that a financial
22 institution's steps to take mitigation efforts voluntarily or
23 to incur costs relating to their security program involving
24 information that had nothing to do with their company but
25 involved consumer information, no court has recognized that

1 type of a theory that that would support a cognizable injury.

2 So let's focus specifically on what the generic
3 allegations include. And these are repeated verbatim for each
4 financial institution Plaintiff in the complaint from 12 to 57.
5 Here's what they say, that the financial institution Plaintiffs
6 are subject to a greater risk of fraudulent banking activity,
7 though there is absolutely no allegation that any such
8 fraudulent activity actually occurred.

9 They say that they have incurred "costs related to
10 undertaking an investigation of the impact of the Equifax data
11 breach." They say that they have incurred "costs related to
12 increased monitoring for fraudulent banking activity." And
13 they say that they have incurred costs related to communicating
14 with customers regarding their concerns.

15 So what does this mean?

16 It means that they haven't alleged what they need to
17 support individual claims; and they can't rely on these
18 generic, collective allegations even if their theory is that
19 the negligence harmed them in uniform ways. They're
20 impermissible, generic, collective allegations; and the
21 complaint just simply doesn't have the specific allegations
22 necessary with respect to each of these individual Plaintiffs.

23 So now what they can't do is they can't manufacture
24 standing by merely inflicting a harm upon themselves based upon
25 the fears of hypothetical future harm as is clear from *Clapper*,

1 and they can't mitigate efforts following a data breach just
2 because they believe that there's an increased risk of theft.
3 That is not enough to confer standing. And, in fact, numerous
4 courts as reflected here have found that mitigation efforts
5 following a data breach are insufficient and an increased risk
6 of theft do not confer standing.

7 In addition, their theory that they were injured due
8 to legal compliance costs also fails because those legal
9 compliance costs do not constitute a cognizable injury. They
10 allege in the most general terms that the GLBA and the SERA
11 required them, the financial institutions, to take certain
12 investigative steps. And they can't show a harm unless there
13 is a real and immediate threat that a government or some agency
14 are going to take action against the financial institutions as
15 a result of Equifax's actions.

16 And there is no such threat here. Merely the
17 compliance expenditures do not suffice, as is evident from this
18 Eleventh Circuit *Kawa Orthodontics* case.

19 So turning now to the fact that financial
20 institutions don't allege sufficient plausible factual
21 allegations demonstrating traceability, even if they could
22 prove an injury in fact, they can't prove that it was traceable
23 to the Equifax data breach.

24 The injuries the financial institution Plaintiffs
25 allege are merely increased fraud prevention measures due to

1 cybersecurity risks generally and their own speculation, their
2 own concern about future possible events. They failed to
3 allege that the increased regulatory compliance costs that the
4 Plaintiffs claim that they may face are traceable to the data
5 breach. What they really are arguing is that the costs that we
6 have today in the cyber world should be attributed to Equifax
7 because they decided to increase their security and take
8 certain steps, and that certainly is not sufficient to confer
9 standing.

10 Finally, on the standing issue, I'd like to turn for
11 a moment to the association Plaintiffs' lack of
12 representational standing. As you know, a number of financial
13 institution associations that are essentially a trade group of
14 small banks have joined the financial institution complaint;
15 and they seek some -- essentially some unspecified equitable
16 relief. But this subset too doesn't have standing because its
17 members otherwise must have standing to sue in their own right,
18 and their members don't as I just described. The interest that
19 the Plaintiff associations seek to protect must be germane to
20 the association's purpose. And, finally, neither the claim
21 asserted nor the relief requested must require participation of
22 the association's members.

23 Here you have this association Plaintiff group that
24 overlaps with the financial institution Plaintiffs, and they
25 don't have standing in their own right as we previously

1 discuss. At best, each of the association Plaintiffs will vary
2 in terms of their own individualized circumstances; and those
3 have not been alleged in the complaint, so determining whether
4 each member of the association will require the Court to make
5 an individualized determination in each case. And here you
6 don't have that information in the complaint. And that is
7 supported by the Eleventh Circuit *Georgia Cemetery Association*
8 case.

9 In addition, they rely on a diversion of resources
10 theory. In one conclusory allegation regarding the association
11 Plaintiffs, they argue that they diverted resources in response
12 to the Equifax data breach. But, again, a general diversion of
13 resources is not enough to establish standing. They don't have
14 any actual specific allegations to support it.

15 So, Your Honor, moving past standing, I will spend a
16 few minutes on the elements of the negligence claim which will
17 demonstrate that they also failed to satisfy the legal standard
18 in that case as well. In order to plead a negligence claim, as
19 you know, they would have to show a duty. There's been a lot
20 of discussion about duty today, and I would like to address the
21 specific duty issue with respect to the financial institution
22 Plaintiffs.

23 They'd have to demonstrate a breach of that duty,
24 causation of the injury alleged and then damages flowing from
25 that. Here the financial institution Plaintiffs failed to

1 establish a duty owed by Equifax. And here it's even more
2 attenuated than what you have heard described earlier which
3 Mr. Haskins addressed, and it's more attenuated than the issues
4 in *McConnell III*. The financial institution Plaintiffs attempt
5 to distinguish *McConnell*, but they fail here. And as you know,
6 in *McConnell* we're talking about that the Plaintiffs were able
7 to allege that it was their own information that was impacted.

8 Here we're not talking about the financial
9 institution information. We're talking about consumer
10 information that the financial institutions argue that Equifax
11 had a duty to the financial institutions to protect.

12 In *Home Depot* and *Arby's*, it was the payment cards
13 issued by the financial institutions that you considered in the
14 *Home Depot* case for purposes of the duty. Except for the very
15 small group here of payment cards -- and if you recall, it's
16 about 200,000 is what we're dealing with, which compared to the
17 numbers that they are alleging of consumer PII they should hold
18 Equifax accountable for, that's a very small group -- if you
19 set that aside, their claim is entirely derivative. The
20 information belongs to third parties, does not belong to them,
21 belongs to customers and, in fact, the consumers who are
22 represented by their colleagues here in the consumer class
23 action.

24 In addition, they refer to intervening act cases; and
25 those do not apply here. In a typical intervening act case a

1 Plaintiff suffers an injury to her person or property as the
2 direct result of a foreseeable criminal act. And although
3 there was a criminal act here and, in fact, Equifax was a
4 victim of that criminal act, it's not the same as the
5 intervening cases that upon which the financial institutions
6 rely.

7 For example, they tried to analogize to a case where
8 a child was shot as a result of the parents allowing another
9 child to carry an air rifle. And they refer to a case in which
10 a Plaintiff was struck by a drunk driver while working on a
11 construction site. Those are all about harm, physical harm;
12 and those cases are not analogous here.

13 In addition, Equifax did not voluntarily assume an
14 otherwise nonexistent duty. For there to be an assumed duty,
15 there must be a voluntary agency relationship; and there's not
16 one here. Under Georgia law, even where a duty is assumed, it
17 can only be a duty to prevent physical harm to another person
18 or property.

19 And in the *Oakwood Mobile Homes* case, a Georgia case
20 that was decided by the Eleventh Circuit, the Eleventh Circuit
21 held that Georgia law has adopted the *Restatement of Torts*
22 governing and undertaking to protect another's property. And
23 there an assumed duty is limited to protecting others from
24 physical harm to person or property.

25 There was obviously no harm to these physical

1 entities. They are not people. They can't be harmed in the
2 physical way as these other cases. It simply doesn't apply.

3 Moving forward to the financial institutions, they
4 cannot meet their burden to show proximate cause. So as is
5 clear from this Georgia case, before any negligence, even if
6 proven, can be actionable, that negligence must be the
7 proximate cause of the injuries sued upon. Indeed, the
8 requirement of proximate cause constitutes a limit on legal
9 liability. And that limit is so important in this case, Your
10 Honor, because of the theory that they're moving under is
11 limitless. This is the type of language that demonstrates
12 there must be a limit.

13 And they can't point to a single case which has
14 allowed a similar theory to go forward. And while it is
15 unprecedented, we looked at some somewhat analogous cases. And
16 even in those cases, the claims were dismissed as we've
17 outlined in our brief. So they cannot point to any that would
18 support that this claim should continue to move forward.

19 They can't establish proximate cause because their
20 claims are entirely derivative. Again, it's the loss of
21 consumer information, not the loss of the financial institution
22 information. What they are saying is that there is a ripple
23 effect, that way down the road that there may be some injury
24 caused to the financial institutions if a number of events take
25 place.

1 I'll go back to Mr. Haskins' "if" example. It's "if"
2 a few more times with respect to the financial institutions.
3 And courts simply don't recognize claims of this kind of
4 purported derivative harm.

5 I will say before I move on on that there are
6 somewhat analogous theories in the tobacco litigation. In
7 there Plaintiffs have sought to bring actions by third-party
8 payers where those payers argue that they are damaged because a
9 tobacco company harmed a patient and as a result of the cost
10 associated with that, so, for example, from a labor union
11 health and welfare funds that they should be compensated for
12 those harms. And the courts have rejected those claims.

13 I will spend a minute or two talking about
14 foreseeability because, again, this is where they focus on
15 foreseeability without focusing on the second aspect of that
16 which is direct injury. And Georgia cases support that you
17 must look at foreseeability and direct injury or remoteness
18 because they are distinct concepts.

19 And here in this *Laborers Local 17* case which is
20 similar to the *CSX* case which Mr. Siegel referenced was the one
21 with the asbestos case in where he was saying they are not
22 going to let the liability go outside the door, well, we'll far
23 outside the door with respect to the financial institution
24 Plaintiffs. *CSX* definitely supports that their theory should
25 not go forward.

1 Proximate cause requires both foreseeability and
2 direct injury, and neither are here. And that is consistent
3 with a variety of Georgia cases. *Vadis Corporation* is a case
4 where this Court said we specifically reject the Plaintiffs'
5 argument which expands professional liability for negligence to
6 an unlimited class of persons whose presence is merely
7 foreseeable. Same thing with *CSX*, rejecting mere
8 foreseeability is a basis for extending duty of care.

9 So the Plaintiffs clarify that what they are really
10 saying is that they are harmed because the financial
11 institutions rely on the personal information that "flows
12 within the nation's credit reporting and verification system."
13 But if you look at these cases, it's inconsistent with that
14 theory.

15 Putting aside, first of all, that, as Mr. Balser said
16 at the beginning of this, the credit information was not even
17 impacted as a result of this data breach. There's a lot of
18 reference to the credit ecosystem and how the financial
19 institutions were impacted because that credit data was
20 impacted. The credit data was not impacted. The credit
21 database was not impacted. So that is not even relevant for
22 purposes of this. But, regardless, courts have consistently
23 dismissed such reliance arguments as reflected in these Georgia
24 cases.

25 In addition, financial institutions Plaintiffs'

1 allegations fail to demonstrate a cognizable injury which is
2 similar to some of the injury arguments that we've been talking
3 about. But since a tort claim fails where liability is
4 established but no damages can be shown, it follows that
5 negligence must fail where no recoverable damages have been
6 pled. And that is the case here. Every named financial
7 institution Plaintiff makes the same allegation of injury,
8 direct out-of-pocket costs related to undertaking an
9 investigation of the impact.

10 But what investigation are we talking about? Does
11 that mean someone within the financial institution sat at their
12 desk and did some research to see what impact it might have on
13 the organization?

14 We have no idea.

15 They also say increased monitoring of potentially
16 fraudulent banking activity, but we don't have any idea what
17 they mean by increased monitoring.

18 Did they go out and buy tools to monitor their
19 systems? Did they hire more people? Did they use manpower?

20 No idea.

21 They also say there are costs related to
22 communicating with customers regarding their concerns in light
23 of the Equifax data breach. But we don't know what
24 communications were sent, who sent them, whether the
25 communications were different, whether they would have sent

1 communications regardless. And, again, the harm was the same
2 alleged for every single financial institution Plaintiff. And
3 surely they would not have been cooperating across all of those
4 named Plaintiffs to decide that they were going to take the
5 same exact actions.

6 The *Collins* case also applies to this situation where
7 it declined to find a cognizable injury in the face of
8 significantly stronger allegations than those at issue here.
9 And I'll remind Your Honor that *Collins* dealt with the
10 individual whose information was stolen, again, not a
11 third-party scenario like the financial institutions allege.
12 But there the Plaintiff alleged that her stolen personal
13 identifying information, including her Social, was posted for
14 sale on the dark web. She argued that she -- alleged that she
15 incurred fraudulent charges on her credit card and that she
16 spent time placing a fraud or credit alert on a credit report,
17 a number of specific actions.

18 And still the court found that those were inadequate.
19 That's a far cry beyond anything that the financial
20 institutions even could think about alleging in their
21 complaint. So there is no negligence claim.

22 Moving to the negligence per se claim, those also
23 fail. Starting with the legal standard, the Plaintiff must
24 establish that a law was violated, the injured person falls
25 within the class of persons it was intended to protect, the

1 harm complained of was the harm the statute was intended to
2 guard against, and a causal connection between the negligence
3 per se and the injury.

4 First of all, we can just stop at this point and not
5 even go through the entire analysis because it goes back to the
6 standing causation and cognizable injury which we have already
7 talked about. They haven't established it. They haven't
8 established it. They can't establish it.

9 And under Georgia law, negligence per se is not
10 liability per se. They still have to prove proximate cause and
11 actual damage in order to recover. And although there is a
12 tendency today for a thought that companies should be held
13 strictly liable once they have a data breach, there is this
14 assumption, well, it must have been unreasonable because a
15 breach occurred. But that is not the standard. And companies
16 can certainly have reasonable security programs and still
17 experience data breaches, as can our own government that has
18 experienced data breaches.

19 If you move beyond that and you look at the actual
20 acts alleged, the FTC Act does not apply to financial
21 institution Plaintiffs' claims. And I'm not going to go back
22 over what Mr. Balser said about the FTC Act, but I do want to
23 raise one point which is specifically relevant to the financial
24 institutions.

25 Here, as is clear from the *SELCO* case, Section 5 in

1 particular seeks to protect consumers and competitors from
2 unfair trade practices. And in that case, the court said
3 Plaintiffs have alleged no harm from the destruction of
4 competition and they are neither Defendant's consumers nor its
5 competitors, so they cannot recover under a theory of
6 negligence per se based on alleged violations of the FTC Act.
7 Here the financial institutions are neither Equifax's consumers
8 nor its competitors. They cannot recover under the FTC Act
9 under negligence per se. And, likewise, the GLBA which is the
10 other act they seek to travel under is insufficiently specific
11 to create such a duty.

12 As the *Wells Fargo Bank* court recognized, it's an
13 aspirational statement of congressional policy that cannot form
14 the basis of a negligence per se claim. And the safeguards
15 rule in the GLBA is no more specific as a whole because it
16 simply sets forth the general requirements that covered
17 entities "develop, implement and maintain an information
18 security program."

19 Here the Plaintiffs don't include factual allegations
20 sufficient to show that Equifax breached the safeguards rule.
21 And, in fact, some of their own allegations in the complaint
22 reflect that Equifax did have an information security program.
23 They did. They developed it. They implemented it, and they
24 maintained it. They may not think that it was reasonable
25 enough, but they certainly argue that Equifax had one.

1 So, Your Honor, the negligence per se claims fail;
2 and we move on to the claims of negligent misrepresentation.
3 Starting with the legal standard here as well, the essential
4 elements are that Defendant's negligent supply of false
5 information to foreseeable persons, known or unknown, and that
6 such persons must reasonably rely upon that false information
7 and they must demonstrate economic injury proximately resulting
8 from such reliance.

9 So they would have to plead the precise statements,
10 documents or misrepresentations made. They would have to plead
11 the time, place and person responsible for the statements.
12 They would have to plead the content, manner in which these
13 statements misled the Plaintiffs and what the Defendant gained
14 by the alleged fraud.

15 Georgia law requires that the maker of the statement
16 also actually be aware that the third party will rely on that
17 information and that the known third party's reliance was the
18 desired result of the misrepresentation. There's no allegation
19 in the complaint that addresses that issue.

20 Their generic allegations do not meet the pleading
21 standards for negligent misrepresentation. Here's what they
22 allege with respect to those misrepresentations. They say that
23 Equifax misrepresented that it would protect PII, including by
24 implementing and maintaining reasonable security measures. And
25 they say that Equifax misrepresented that it would comply with

1 common law and statutory duties pertaining to the security of
2 PII. But they don't include anything specific about how these
3 statements were made, to whom they were made, on what basis the
4 financial institutions relied on them and, importantly, that
5 Equifax made those representations with the intent that the
6 financial institutions would rely on them.

7 In addition, the financial institutions' theory of
8 recovery is unrelated to reliance on the misrepresentations
9 allegedly made by Equifax. They talk about this credit
10 ecosystem, and they say that Equifax damaged the whole credit
11 ecosystem thereby damaging the Plaintiffs. But they fail to
12 allege that they relied on any specific representation by
13 Equifax and, in addition, that their acts and what they did
14 would have been different regardless of whether Equifax made
15 those representations.

16 So they incur costs on a regular basis to participate
17 in this credit ecosystem. They have to monitor their customer
18 accounts. They have to communicate with their customers. They
19 have to pay attention to threats. They have to think about
20 what they need to do to investigate and improve their security.
21 They've alleged nothing that would indicate that they took
22 those steps that they did because of representations made by
23 Equifax.

24 The negligent misrepresentation claims fail. I'm
25 going to move briefly to the specific statutory claims which

1 also fail.

2 They can't mask the pleading deficiencies that I have
3 been discussing by relying on miscellaneous state statutes.
4 None of the statutes on which the financial institutions rely
5 allow them to abrogate the same requirements of causation, of
6 standing, of injury. So, again, right out of the box they are
7 not going to be able to pass muster with their very attenuated
8 theory.

9 In addition, they can't establish the crucial
10 elements; and their statutory claims fail. I don't have enough
11 time, Your Honor, to go through the chart of all of those
12 claims that are in the complaint. But we do have one attached
13 to our motion to dismiss, and we ask that you take a look at
14 those because it does reflect that -- and ties the reasons why
15 these claims fail.

16 But, frankly, they're just particularly unsuited for
17 the financial institutions. These state-specific statutory
18 claims were not designed for this type of a scenario. Many of
19 them on which the Plaintiffs rely require claims to be brought
20 by consumers because they are -- or relate to consumer
21 transactions. We don't have any consumers involved in making
22 these claims with the financial institutions, and we don't have
23 consumer transactions at issue.

24 And they're not related to the consumption of Equifax
25 products or transactions with the Plaintiffs themselves, the

1 financial institutions. And, in fact, many of these statutes
2 are actually consumer protection statutes, not financial
3 institution protection statutes. So, Your Honor, those fail as
4 well.

5 And now we come full circle from where we began
6 because the last thing I would like to address are the
7 financial institutions' payment card claims. The way that this
8 was set up you would think that this whole case was about 145
9 million credit cards and that's why we are here today because
10 the financial institutions would be seeking to hold Equifax
11 accountable for that. But that's not why they're here.

12 You've heard their very attenuated theory regarding
13 the vast majority of their case. There is one small component
14 where credit cards were involved. Approximately 200,000 were
15 the number of cards involved. And even with those they failed
16 to include sufficient allegations to state a claim with respect
17 to those payment cards.

18 So here's what they allege, the limited number of
19 named Plaintiffs who even have credit cards involved. What
20 they allege is that they were informed by the card brands that
21 they had issued payment cards that may have been impacted in
22 the data breach.

23 So despite alleging that they were informed by the
24 cards, not one of them alleged that they had to actually refund
25 fraudulent charges made on a single one of those credit cards

1 or that they allege any specific cost associated with replacing
2 those impacted cards. Certainly had they had the ability to
3 make those allegations, that subset of Plaintiffs would have
4 done so. That's very different again from the *Home Depot* case
5 and the facts alleged in that case where the facts involved
6 allegations of cards being posted for sale online and
7 fraudulent credit card charges on the cards that were used at
8 the *Home Depot* stores and specific allegations around the
9 reissuance of those cards.

10 The financial institution Plaintiffs' payment card
11 claims are also barred by the economic loss rule. And the case
12 that is most on point is the *Schnuck Markets* case. There tort
13 law does not recognize a remedy to cardholder banks against a
14 retail merchant who suffered a data breach above and beyond the
15 remedies provided by the network of contracts that link
16 merchants, card processors' banks and card brands to enable
17 electronic card payments. And I know Your Honor learned quite
18 a lot about that process in the *Home Depot* case and the
19 contractual relationships amongst the various parties in that
20 context.

21 Here the financial institution card Plaintiffs have
22 admittedly agreed that they are -- that Equifax and they are
23 subject to those card brand agreements. Their own allegations
24 include that Equifax regularly accepts debit and credit cards
25 and that Equifax is subject to the payment card industry data

1 security standards. So they recognize that that applies in
2 this circumstance.

3 And if you think about the holding in the *Home Depot*
4 case, the conclusion there that the economic loss rule did not
5 apply to payment card claims because Georgia law imposed an
6 independent duty to protect PII was clarified in *McConnell III*
7 which held that there is no such independent duty. And, of
8 course, Mr. Balser spent quite a long time discussing the
9 *McConnell* case and where we are in the state of the law at this
10 point.

11 In addition, there's a recent decision out of the
12 District of Colorado involving the same actual Plaintiffs'
13 counsel in some of the -- some involved here and one of the
14 overlapping named Plaintiffs, Alcoa Community Credit Union,
15 where the court there in the *Bellwether Community Credit Union*
16 case dismissed payment card claims on the same grounds as
17 *Schnuck*.

18 Your Honor, that takes us to the final set of claims
19 for the financial institution Plaintiffs. And all of these
20 claims fail, and we would ask Your Honor that you would dismiss
21 the complaint with prejudice.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Ms. Sumner.

24 MR. GUGLIELMO: Your Honor, this is Joseph Guglielmo.
25 Before we begin, can we take a few-minute recess?

1 THE COURT: Yes, I planned to whether you had asked
2 for it or not. So I certainly intend to do it.

3 All right. Let's take a 15-minute break.

4 Court's in recess for 15 minutes.

5 (A short recess was taken.)

6 MR. GUGLIELMO: Good afternoon, Your Honor. My name
7 is Joseph Guglielmo, and I am one of the co-lead counsel for
8 the financial institution Plaintiffs. This afternoon, Your
9 Honor, Mr. Lynch and I have divided up the argument. I am
10 going to be discussing the facts addressing the standing
11 issues, the negligent misrepresentation claims and then briefly
12 touch upon the state UDAP claims. And Mr. Lynch is going to be
13 handling the argument with respect to the negligence and
14 negligence per se claims.

15 Your Honor, we are here on behalf of 46 financial
16 institutions who are credit unions and banks located throughout
17 the United States who are direct participants in the credit
18 reporting system, whose customers' personally identifiable
19 information, or PII, and payment card data, otherwise known as
20 PCD, were compromised by Equifax and who suffered out-of-pocket
21 direct losses as a result of Equifax's actions. We are also
22 here on behalf of 24 national and state credit union
23 associations who bring those claims as associations for
24 declaratory and injunctive relief to require Equifax to
25 implement adequate data security measures and ensure that

1 financial institutions' customers' data is secure.

2 Your Honor, in listening to the hours of argument
3 that have gone on today, it's evident that there's a common
4 theme. And the common theme is that the Defendants have
5 ignored the specific facts alleged in the complaint. They have
6 attempted to ignore controlling case law. And they have
7 essentially tried to argue that the actions here are different
8 than other data breaches, Your Honor.

9 They are different in that the harm here is far more
10 severe to financial institutions than just payment card data.
11 Payment card data can essentially be reissued. What was at
12 issue here, Your Honor, is that Equifax engaged in one of the
13 largest and most damaging data breaches in the history of this
14 country given the magnitude and type of information that was
15 stolen.

16 Your Honor, credit is ubiquitous. Americans rely on
17 credit in every facet of their lives. We are here today
18 because the financial institutions are the entities that extend
19 this credit and are an integral part of the credit reporting
20 system. We are also here today because Equifax has undermined
21 the credit reporting system directly harming the financial
22 institution Plaintiffs.

23 Your Honor, as this slide shows, the financial
24 institution Plaintiffs and Equifax are participants in the
25 credit reporting system. In order for the financial services

1 industry to function, the credit reporting system relies on
2 data furnishers like the financial institutions and credit
3 reporting agencies like Equifax.

4 Equifax is a credit reporting agency that collects,
5 maintains, aggregates and sells sensitive personal information
6 on hundreds of millions of individuals. Credit reporting
7 agencies such as Equifax compile PII and other personal
8 information obtained from data furnishers who are our clients,
9 and they create credit reports and other types of documents.

10 The information that Equifax collects and sells is
11 the backbone of the credit reporting system and the U.S.
12 economy. Financial institutions both furnish and receive this
13 confidential PII from the credit reporting agencies about their
14 customers. The financial institutions rely on the accuracy and
15 the integrity of the information supplied within the credit
16 reporting system to extend credit to their customers and
17 provide other financial services.

18 Your Honor, the accuracy, integrity and reliability
19 of the information within the credit reporting system is
20 essential for financial institutions to evaluate their credit
21 risk and ensure their fiscal soundness. Financial institutions
22 need to know who they are extending credit to and the
23 creditworthiness of those individuals.

24 Equifax was entrusted with this sensitive personal
25 information and was responsible for maintaining and securing

1 the information. The Equifax data breach compromised
2 Plaintiffs' customers' PII and PCD and thereby damaged the
3 entire credit reporting system which directly and proximately
4 caused injury to our clients.

5 Your Honor, as set forth in the complaint -- and I
6 know Ms. Sumner characterized our allegations as essentially
7 not specific or too specific or too more of the same -- Your
8 Honor, these injuries that we have suffered -- and I will set
9 them forth in this slide to you -- these are direct
10 out-of-pocket costs relating to the Equifax data breach, not
11 something else. Plaintiffs extended -- sorry -- expended time
12 and money responding to the Equifax data breach. They
13 implemented additional and enhanced security measures to
14 protect their customers' PII specifically in response to this
15 breach. They responded to their customers' concerns regarding
16 their PII.

17 That takes time. It takes effort. It's an
18 out-of-pocket cost that they've incurred. They investigated
19 the impact of the Equifax data breach.

20 Your Honor, this is not a voluntary cost. The
21 Gramm-Leach-Bliley Act and the Fair Credit Reporting Act
22 require financial institutions to investigate the soundness and
23 safety of their customers' information. And this was a direct
24 response to the Equifax data breach.

25 And then contrary to what Ms. Sumner said, we have

1 specific out-of-pocket costs relating to cancelling and
2 reissuing payment cards that were compromised from the Equifax
3 data breach and reimbursing our customers for fraudulent
4 transactions, again, on the compromised payment cards.

5 In addition to these out-of-pocket injuries, Your
6 Honor, the financial institutions have suffered an impending
7 risk of future harm, of fraudulent banking activity as a direct
8 result of the compromised PII; and they are entitled to
9 injunctive relief. Again, these direct out-of-pocket costs and
10 harms are the quintessential injuries in fact that satisfy
11 Article III.

12 And, Your Honor, I'd like to point out in *Home Depot*
13 you made that exact same point. You stated here, said here,
14 "The financial institution Plaintiffs have adequately pleaded
15 standing. Specifically, the banks have pleaded actual injury
16 in the form of costs to cancel and reissue compromised --
17 reissue cards compromised in the data breach, costs to refund
18 fraudulent charges, costs to investigate fraudulent charges,
19 costs for customer fraud monitoring and costs due to lost
20 interest in transaction fees due to reduced card usage. These
21 injuries are not speculative and are not threatened future
22 injuries but are actual current monetary damages.
23 Additionally, any costs undertaken to avoid future harm from
24 the data breach would fall under Footnote 5 of *Clapper*
25 specifically as reasonable mitigation costs due to a

1 substantial risk of harm."

2 Then you go on and you say, Your Honor, "These
3 injuries as pleaded are also fairly traceable to Home Depot's
4 conduct."

5 Your Honor, again, a component of the injury that our
6 clients suffered was payment card fraud losses and reissue
7 costs. But the other costs, the time and money responding to
8 the breach, the additional enhanced data security measures,
9 those are very similar, if not identical, to the same costs we
10 pled there. The specificity pled in this complaint was far
11 greater than the specificity pled in *Home Depot* where you said
12 that Plaintiffs had satisfied standing.

13 Your Honor, the injuries also are clearly traceable
14 to this breach and they're clearly traceable to Equifax's
15 inadequate data security measures that caused the breach.
16 Contrary to what Ms. Sumner said and what Equifax has said, the
17 financial institution Plaintiffs are the most proximate victim
18 of the Equifax data breach. They're the entities that bear the
19 ultimate risk of loss. When consumers have a fraudulent
20 charge, the financial institutions are the ones that reimburse
21 them. The costs associated with protecting their -- the
22 customers' information fall squarely on the financial
23 institutions' shoulders, Your Honor.

24 So with respect to traceability, we think that we
25 clearly have satisfied that. Defendant's arguments contradict

1 the factual allegations in our complaint that we took specific
2 steps in response to this breach to protect the PII and to
3 enhance data security measures.

4 Equifax, Your Honor, ignores some of the things they
5 said publicly. And one of the things that they set forth --
6 and we have it in our complaint -- relates to how synthetic
7 identification or synthetic IDs can be created. And those
8 basically, Your Honor, are when someone takes a stolen Social
9 Security number and basically opens up a number of credit card
10 accounts. I think Mr. Canfield had mentioned that earlier.

11 One of the things that happens is they steal the
12 personally identifiable information, and they open up a number
13 of credit cards. They open up a number of loans. One of the
14 things that's mentioned in our complaint it's called bust-out
15 fraud. What happens there is the financial institutions are on
16 the hook for all of those fraudulent transactions. That's the
17 type of injury that our clients have suffered. Financial
18 institutions are responsible for protecting the clients' data,
19 and they had to take steps in response to this breach.

20 In response to Defendant's arguments that Plaintiffs'
21 injuries are self-inflicted, it's simply wrong. It's also
22 implausible for them to suggest that in response to the largest
23 theft of PII in the United States that financial institution
24 Plaintiffs would simply do nothing. Defendant's argument, Your
25 Honor, also ignores controlling Eleventh Circuit authority in

1 the *Resnick* case which held in the context of a data breach
2 that traceability was established under similar facts as those
3 alleged in our complaint. Like in *Resnick*, the Plaintiffs here
4 were direct and proximate victims. They were required to
5 protect the PII and PCD which is the backbone of the credit
6 reporting system. Defendants failed to secure the data, the
7 PII and PCD; and Plaintiffs were injured as they can no longer
8 rely on the accuracy and integrity of that information to
9 determine the creditworthiness and the identity of their
10 customers.

11 Your Honor, one of the things I want to respond to is
12 the Defendants point out that we haven't pled specific
13 individual injuries. It's simply not true. If you look at the
14 paragraphs of the complaint, we set forth the types of
15 injuries. And it's not unusual, Your Honor, that the financial
16 institution Plaintiffs suffered the same injuries arising out
17 of a singular breach; that they were required to do the same
18 things; that they would reissue cards, payment cards; that they
19 would suffer losses similarly. So there's nothing unusual
20 about the allegations we pled.

21 Again, our standing here is no different than in the
22 payment card context except that the data that was stolen here
23 cannot be replaced. A financial institution can replace a
24 payment card. They can issue new numbers. They can't replace
25 someone's date of birth or Social Security number which is the

1 data used by our clients to verify the identity of their
2 customers. So the harm to the financial institutions here is
3 far worse and lasting.

4 Your Honor, since Equifax doesn't challenge the third
5 prong, redressability, we believe that you can find that
6 Plaintiffs' allegations establish Article III standing like you
7 did in the *Home Depot* case. And for the same reasons why the
8 financial institutions have standing, Plaintiffs' allegations
9 as to the associations, Your Honor, also likewise are
10 sufficient under two specific theories we have set forth, the
11 diversion of resources theory, Your Honor, which is set forth
12 in the *Havens* case and then under the associational standing
13 test which is in the *Hunt v. Washington State Apple Advertising*
14 *Commission*.

15 Your Honor, you looked at these same arguments and
16 rejected them in the *Home Depot* case finding that the
17 association Plaintiffs had sufficiently alleged standing. We
18 believe you can do the same here.

19 As I said, Your Honor, we believe that Plaintiffs
20 have asserted their claims and have been harmed by Equifax's
21 conduct. And we are here today to go to the legal claims, to
22 discuss the legal claims and seek redress for the injuries
23 Equifax has caused through compromising the data contained
24 within the credit reporting system.

25 And I'm going to turn to the representations, Your

1 Honor, because I think that's a very important point that we
2 have to discuss. Contrary to the Defendant's arguments,
3 Equifax made a number of representations that it took
4 reasonable steps to ensure that the data it collected and that
5 they were entrusted to maintain was safe and secure. And as we
6 will show, those statements were clearly false.

7 You know, I will point you to specific allegations,
8 Your Honor. These are in our complaint, and so I want to just
9 highlight a few of them. For example, Your Honor, Equifax
10 acknowledged that it was specifically required to comply with
11 federal and state laws to protect the sensitive data, including
12 the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the
13 FTC Act and state UDAP statutes.

14 For example, on the first bullet, Equifax states in
15 their 10K -- and, again, Ms. Sumner said that they don't know
16 who made the statement, when the statement was made or where it
17 was made. This is all in the complaint. It's the 10K. That's
18 their SEC filing. It was the February 22, 2017; and it was at
19 page 10. They said we are subject to numerous laws and
20 regulations governing the collection, protection and use of
21 consumer credit and other information and imposing sanctions on
22 the misuse of such information or unauthorized access to data.

23 Again, Your Honor, Equifax also acknowledged -- this
24 was foreseeable. Equifax acknowledged that it was the target
25 of attempted cybersecurity threats and knew that financial

1 institution Plaintiffs would rely on its statements that it
2 would maintain this data and that it would be safe and secure.
3 It stated again in the 10K, "We are regularly the target of
4 attempted cyber and other security threats and must
5 continuously monitor and develop our information technology
6 networks and infrastructure to prevent, detect, address and
7 mitigate the risk of unauthorized access, misuse, computer
8 viruses and other events that could have a serious impact."

9 Again, these are their statements. They are in their
10 SEC filings. Financial institution Plaintiffs would not
11 provide information to a credit reporting agency that was not
12 obligated under the law to maintain the information as safe and
13 secure. They would be violating the Gramm-Leach-Bliley Act and
14 Fair Credit Reporting Act and a number of other statutes. So,
15 yes, we had to rely on the statements and, yes, we had to rely
16 on the fact that they, like the financial institutions, were
17 maintaining this data in a safe and secure manner.

18 Again, contrary to what was said earlier, financial
19 institutions, in fact, believed that they were doing these
20 things. And Equifax understood that financial institutions
21 would rely. It says, "Businesses rely on us for consumer and
22 business credit intelligence. Our products and services enable
23 businesses to make credit and service decisions and manage
24 their portfolio risk." Again, these are in the SEC filings,
25 Your Honor.

1 I'm just going to briefly touch on with respect to
2 this next slide a few of them. I'm not going to go through all
3 of them in detail. But Equifax represented specifically that
4 it was a trusted steward of credit information for thousands of
5 financial institutions.

6 Who else was the audience?

7 Then it goes on to say that it follows a strict
8 commitment to data excellence that helps lenders get the
9 quality information they need to help make better business
10 decisions. It has security protocols and measures in place to
11 protect the personally identifiable information from
12 unauthorized access or alteration.

13 In light of these facts, Your Honor, Equifax's
14 argument that it made no representations regarding data
15 security measures or that Plaintiffs -- it's implausible that
16 Plaintiffs relied on such statements is simply not credible.
17 Clearly, the foregoing statements, Your Honor, establish that
18 Defendant made specific representations with two Plaintiffs
19 regarding security measures and that Equifax intended
20 Plaintiffs to rely on those statements when they were made.

21 The facts also demonstrate, Your Honor, that the
22 representations that it understood its duty to protect this
23 information and that it would, in fact, take necessary steps
24 were simply false. One of the things that Ms. Sumner raised
25 was proximate cause. Well, first of all, proximate cause, if

1 anything, is a question for the jury. But here, Your Honor,
2 Equifax's actions are a "but for" cause for Plaintiffs' harm.

3 So I set forth a few of the things that Equifax did,
4 actions they took. And you're very familiar with them, Your
5 Honor, because you have heard them a few times this morning
6 from our colleagues on the consumer side.

7 Equifax, not some other actor, had inadequate data
8 security measures. Equifax, not some other actor, improperly
9 patched the Apache Struts vulnerability that left key systems
10 exposed and vulnerable to the threat that ultimately caused the
11 breach. Equifax, not some other actor, chose not to update the
12 SSL security certificates.

13 Your Honor, these are basic industry standard
14 measures they basically did not follow.

15 Equifax lacked adequate network segmentation, and
16 that would have limited a hacker's access to the various
17 databases. Equifax lacked file integrity monitoring which
18 would have alerted them to the exfiltration of this data.

19 So it's Equifax's actions that proximately caused
20 Plaintiffs' harm. But for their actions, Your Honor, the data
21 breach would not have occurred and Plaintiffs would not have
22 incurred their direct out-of-pocket costs.

23 Basically, Your Honor, as set forth in our complaint,
24 Equifax prioritized their profits over protecting PII. And
25 these facts again cannot be credibly disputed. These facts,

1 Your Honor, also support Plaintiffs' negligent
2 misrepresentation claim. I just want to respond briefly to one
3 or two points that were made.

4 Equifax again states that Plaintiff failed to
5 identify who at Equifax made the statements or when the
6 statements were made. They rely on the *American Dental*
7 *Association* case. Well, that's a case that's a RICO case. It
8 talks about pleading requirements and pleading with specificity
9 under RICO.

10 You can look at that case as long as you -- as hard
11 as you want. You're not going to find a negligent
12 misrepresentation claim in there. So, in reality, we did plead
13 the specific facts of who. It was Equifax in their SEC
14 filings. We did plead when. We set forth the specific details
15 of when they made those statements. The argument is simply
16 nonsense.

17 So I think, Your Honor, we have pled the requirements
18 for the negligent misrepresentation claim. There's nothing
19 more that's required. The facts that I set forth that are in
20 the complaint that we highlighted, those facts also establish
21 Plaintiffs' unfair deceptive acts and practices or UDAP claims.

22 And before I turn my argument over to Mr. Lynch to
23 talk about negligence and negligence per se, I just want to
24 briefly address two arguments that were made by Equifax
25 regarding Plaintiffs' UDAP claims. One is this

1 extraterritoriality argument. Equifax basically argues that
2 Plaintiffs cannot bring non-Georgia UDAP claims because all of
3 the activity at issue occurred in Georgia and that there's
4 court authority that says that it can't be done.

5 Well, Equifax, number one, ignores Supreme Court
6 authority governing choice of law principles and seeks to
7 circumvent a traditional choice of law analysis set forth in
8 the *Hague* case. It also -- like I said, it mischaracterizes
9 the facts. I will give you one example.

10 Paragraph 405 relating to the FDUTPA claim, that
11 paragraph specifically states that the conduct at issue with
12 respect to the deceptive or UDAP statutes took place in Florida
13 and that Plaintiffs were injured in Florida. So for Equifax to
14 stand up and say that the allegations and the facts only relate
15 to Georgia is just simply not supported by the actual
16 allegations in the complaint.

17 Your Honor, the other point I want to raise is that
18 Equifax states that *McConnell* requires dismissal of the
19 Plaintiffs' Georgia Fair Business Practices Act claim. It
20 doesn't. *McConnell*, as everyone knows, there was no Georgia
21 Fair Business Practices Act claim pled.

22 If you look at the *Arby's* decision, Your Honor, I
23 think that's obviously more on point there. Judge Totenberg
24 upheld the GFBPA claim, and we think you should do the same
25 here.

1 Your Honor, we intend to rely on our papers with
2 respect to the specifics of the UDAP claims. I just want to
3 point out one final thing. Plaintiffs aren't required to plead
4 all the elements of fraud in connection with their UDAP claims.
5 The Defendants ignored this in their opposition, and they
6 ignored this in the argument. Half of our state UDAP claims
7 are based on unfair conduct. So you don't need to plead fraud
8 or the elements of fraud. The other half of those claims are
9 based on deception; and they do not require, again, all the
10 elements of fraud.

11 So, again, you sustained similar claims, Your Honor,
12 the Massachusetts claim in *Home Depot*. In *Target* the Minnesota
13 claim was upheld. It was also upheld in *Home Depot*. These
14 UDAP statutes claims are normally upheld in these contexts.

15 And, Your Honor, we again just rely on our papers
16 that the Plaintiffs have validly stated a declaratory judgment
17 act claim. And unless you have any questions, I'm going to
18 hand over the argument to Mr. Lynch.

19 THE COURT: All right.

20 MR. LYNCH: Good afternoon, Your Honor. Gary Lynch,
21 co-lead counsel for the financial institution Plaintiffs.

22 Your Honor, before I begin, I want to formally say
23 that I don't mind going last in a five-hour hearing. I do want
24 to lodge an objection about having to go after Governor Barnes.

25 Much of what I'm going to say today is going to echo

1 many of the things that Governor Barnes said because I want to
2 talk about first principles because I think as it relates to
3 the negligence claim the first principles have been called out
4 today. There's an elephant in the room that needs to be
5 addressed.

6 And the first one is this notion that there's not a
7 duty to act reasonably at all times. I mean, there's a
8 fundamental tenet in negligence law, and it's the most
9 fundamental tenet of the common law, and that tenet is that an
10 actor that sets out on a course of conduct must do so with an
11 objectively reasonable level of care so as not to cause
12 foreseeable harm to foreseeable victims. The Supreme Court of
13 Georgia has recognized this fundamental legal duty as a general
14 duty one owes to all the world not to subject them to an
15 unreasonable risk of harm. That's the *Bradley Center v.*
16 *Wessner* case that we have been talking about.

17 That principle of law is what -- and that decision in
18 which it appears, which they cite other Supreme Court cases, I
19 believe, of Georgia over the years -- that's not limited to the
20 facts of any case. That's just a general principle of common
21 law, and it probably exists in every single state in this
22 country. It's the foundation of our common law.

23 And they quote -- and the Supreme Court of Georgia
24 quotes the *Restatement of Torts* in defining of this rule. And
25 it says, and I'm quoting, "as conduct which falls below the

1 standard established by loss of protection of others against an
2 unreasonable risk of harm." And that's the *Restatement* 2nd,
3 Section 282.

4 The essential policy underpinnings of this common law
5 principle bear mentioning, and those underpinnings are that by
6 attaching liability to the failure to act reasonably the law
7 incentivizes those in a position of control of foreseeable risk
8 to actually do so. This Court actually recognized that policy
9 in the *Home Depot* financial institutions decision with regard
10 to the motion to dismiss in that case. In the *Home Depot* case,
11 this Court recognized it and said, quote -- no, it recognized
12 that when it held that to hold that no duty existed in the
13 context of a payment card data breach "would allow retailers to
14 use outdated security measures and turn a blind eye to the
15 ever-increasing risk of cyber attacks, leaving consumers with
16 no recourse to recover damages even though the retailer was in
17 a superior position to safeguard the public from such a risk."

18 In Your Honor's quote right there from the *Home Depot*
19 decision, you've synthesized the very social policy
20 underpinnings of this fundamental tenet of the common law.
21 Like the payment card data breach at issue in *Home Depot*, this
22 case does not involve the creation of a new affirmative duty
23 but rather the application of traditional tort principles of
24 negligence to do a -- to a somewhat model factual scenario
25 created by the explosion in information technology over the

1 last few decades. But development in technology is not grounds
2 to give Equifax immunity from the overarching, well-established
3 duty to act reasonably under the circumstances.

4 We all have that duty. Equifax is not immune from
5 that. And data breaches are a new occurrence over the last few
6 years. That's true. But automobiles were a new occurrence 100
7 years ago; and we applied basic, common sense principles of
8 negligence to how people drove automobiles once they were
9 invented and manufactured. There's nothing new here. The
10 principle of law applies. The facts may change, the scenarios
11 may change, but that duty is always present.

12 To suggest that Plaintiffs in this case are
13 attempting to create and impose a new duty to protect PII
14 misses the mark completely. The fact pattern is new. We admit
15 that. And it's becoming less new unfortunately as these data
16 breaches continue to occur. But the duty Plaintiffs seek to
17 oppose here is as old as the common law itself.

18 Your Honor, again, one more time, when you act in our
19 society you must do so with a reasonable level of care to avoid
20 foreseeable risk to foreseeable victims. That principle of law
21 is clearly the law of Georgia, and it's not going to change.
22 And, also, it couldn't be more benign. That's a fairly basic
23 premise.

24 As I was reviewing the briefing of Equifax as it
25 relates to the negligence claims, it dawned on me that at the

1 end of the day the financial institution Plaintiffs are
2 basically being accused of being Mrs. Palsgraf. That's what
3 they are saying. And so accepting for a minute that this case
4 involves only an application of the longstanding general
5 principles of duty that it becomes clear that the existence of
6 a duty is not what's at issue. Rather, the question is whether
7 the duty properly extends to the financial institutions in this
8 case. Hence, the issue is one of foreseeability.

9 Because I feel like Mrs. Palsgraf as I stand up here,
10 I think it's necessary to spend a few minutes talking about her
11 if you don't mind, Your Honor.

12 As you might recall, Your Honor, things didn't work
13 out too well for Mrs. Palsgraf. So we don't really want to be
14 Mrs. Palsgraf. But I want to talk about her situation and see
15 who remembers from first year of law school what the facts of
16 this case are about. I am going to refresh your memory very
17 quickly.

18 THE COURT: It involved a firecracker. That's about
19 all I remember.

20 MR. LYNCH: It certainly did. It involved
21 explosives, and they were in that little package right here
22 being carried by a fella trying to catch that train. And as
23 that train was taking off from the platform, he was running to
24 jump in the door, and a couple of the railroad employees tried
25 to help him.

1 And as they were helping him, the package which was
2 wrapped in newspaper fell on the tracks and exploded. And the
3 explosion ended up rattling the stand or the scale over by
4 Mrs. Palsgraf here, fell on her and injured her. And she was
5 two platforms away from where the train was and where the
6 explosion occurred.

7 Justice Cardozo in dealing with that fact pattern
8 took it as an opportunity to talk about how foreseeability
9 impacts the existence of a duty and how far a duty extends. In
10 concluding that no duty was owed to Mrs. Palsgraf because she
11 was outside of the foreseeable zone of danger, he stated it
12 perfectly when he said in his decision, and I'm quoting, "The
13 orbit of the danger as disclosed to the eye of reasonable
14 vigilance would be the orbit of the duty." And as it related
15 to Mrs. Palsgraf, he went on to say, "There was nothing in the
16 situation to suggest to the most cautious mind that the parcel
17 wrapped in newspaper would spread wreckage through the
18 station."

19 Well, as I said, Your Honor, the financial
20 institution Plaintiffs are not Mrs. Palsgraf. And we have made
21 several more-than-plausible allegations, most of which are
22 admissions by Equifax, that establish that from Equifax's
23 standpoint we are absolutely in the foreseeable zone of danger.
24 And I'd like to demonstrate that by tampering with the *Palsgraf*
25 case a bit.

1 In *Palsgraf*, a key fact, if not the dispositive fact,
2 was that nobody knew or could reasonably expect that there were
3 explosives in that small package carried by the passenger
4 running to catch his train.

5 But what if everyone on the train platform knew that
6 he was carrying explosives? What if they knew that as a matter
7 of fact the orbit of the danger extended all the way to where
8 Mrs. Palsgraf was standing?

9 And I'm suggesting that, Your Honor, because that's
10 our case. Here everyone knows that PII is on the platform, and
11 everyone knows that PII is dangerous when compromised. In
12 short, everyone knows, including Equifax, that the package
13 contains explosives.

14 As Cardozo said, the commonly understood orbit of the
15 danger defines the orbit of the duty. The FI Plaintiffs are
16 within the orbit. Equifax has admitted -- and this is in our
17 complaint, paragraph 133. They have admitted, they have said,
18 and I'm quoting, "We are regularly the target of attempted
19 cyber and other security threats." They know that is there.
20 They know the PII is sensitive. They know that when it's
21 compromised it can cause harm beyond just the immediate
22 vicinity of where that package fell on that train station
23 platform.

24 And let me very quickly to give you another -- the
25 internet is a great thing, Your Honor. You can pull all kinds

1 of information off of there. This is another depiction of the
2 *Palsgraf* case. And you can see in this case this was Justice
3 Cardozo's whole point was that because nobody knew that that
4 package was anything other than a package and didn't have the
5 ability to explode and detonate that the zone of danger as
6 those employees of the railroad were helping that passenger
7 board that train, the worst that could happen with anybody
8 being hurt was in that red circle because nothing was going to
9 explode reasonably foreseeably anyway. Right?

10 And so that's what we're talking about here. I'm
11 suggesting that if we would know as we know here, if we knew
12 then that there were explosives in that package, that red
13 circle would be much broader. I would venture to say that it
14 would be at least that broad extending to where Mrs. Palsgraf
15 is standing. And that's exactly where the financial
16 institutions stand in this case.

17 Everybody knows that PII is used as part of a credit
18 reporting system. Everybody knows that it's sensitive and it's
19 sought after by cyber thieves. So the compromise of that data
20 everybody knows is going to harm my clients' ability to verify
21 the identity of their customers, do credit checks on their
22 customers and engage in other banking activity with their
23 customers. Just like when they compromised the payment cards
24 in the *Home Depot* case, the financial institutions were on the
25 hook to pay for any fraudulent activity that occurred on those

1 cards. And because they had that obligation, they had the
2 obligation to replace those cards and incurred costs to do
3 that.

4 Same thing here. Everybody knows we now have a
5 situation where with customers PII can't be relied on to
6 identify who they are. That's how banks operate. So now they
7 have to devise new ways to authenticate customers. They have
8 to deal with the risk created by this data breach. It's the
9 same exact thing as the payment card breach, Your Honor.

10 Let's keep going on with the *Palsgraf* analogy.
11 Hopefully, I won't beat it to death. I have a couple more
12 points to make with it. Also, in the *Palsgraf* case there was
13 no indication that the railroad had made any representations to
14 Mrs. Palsgraf about their ability to control the risk by having
15 this posted on the platform.

16 But what if the railroad company would have assured
17 Mrs. Palsgraf that, while there may be explosives on the train
18 platform, she need not worry because the railroad was a trusted
19 steward of explosives for thousands of passengers coming and
20 going from the train platform every day?

21 That's exactly what happened here. Equifax has said
22 they are the trusted steward of credit information for
23 thousands of financial institutions and businesses. And
24 Equifax has indicated that it takes this responsibility
25 seriously and follows strict commitment on data excellence. In

1 fact, their CEO has said that securing data is the core value
2 of our company. Imagine the outcome in Mrs. Palsgraf's case if
3 the railroad had told her that there are explosives on the
4 platform but not to worry because handling explosives is the
5 core value of the railroad.

6 Permit me to take up the case a bit more. In
7 *Palsgraf*, all indications were that Mrs. Palsgraf was just a
8 normal passenger waiting for a train.

9 But what if Mrs. Palsgraf was not a normal passenger?
10 What if she was at the station to pick up and drop off packages
11 of explosives herself? In fact, what if everyone on the
12 platform was there to either deliver or receive explosives
13 because the transportation of explosives was the railroad's
14 primary business?

15 Because that's the situation in this case. Equifax
16 deals in PII. The financial institutions deal in PII. We use
17 PII to identify the consumers that we are analyzing to extend
18 credit to and to have other banking relationships with. Their
19 reason for being on the platform is for the express purpose of
20 exchanging information with Equifax that requires the exchange
21 of PII in order to identify the consumers to whom the
22 information pertains.

23 But let's keep going. What if safety experts for the
24 railroad in *Palsgraf* reviewed the railroad platform in the days
25 before the accident and told the railroad that there were holes

1 in the platform that needed to be patched and without those
2 patches the platform was unreasonably dangerous to handle
3 explosives but the railroad failed to heed those warnings?

4 Because that, again, is what happened here, Your
5 Honor. Equifax was told there was a problem that made them
6 vulnerable to cyber attack and that they needed to take actions
7 to protect against the risk that PII would be compromised.
8 They didn't do anything. They didn't patch the hole in the
9 platform.

10 And then, finally, in *Palsgraf* there was no
11 indication that the package of explosives had ever detonated
12 before. But what if the railroad knew that on five previous
13 occasions packages had exploded on their train platform?

14 Because that's what happened here. Equifax suffered
15 at least five previous data compromises. If this Court is
16 looking to foreseeability to define the orbit of duty -- and I
17 respectfully suggest that it should and it needs to -- it need
18 not look much further than the allegations of our complaint.

19 So just to conclude with the analogy to the *Palsgraf*
20 case, Your Honor, unlike the railroad company in *Palsgraf*,
21 Equifax knew the dynamite was there. They knew the sensitivity
22 and volatility of all the data it collected. Unlike the
23 railroad company, Equifax knew from its constant back-and-forth
24 interactions with financial institutions the Plaintiffs were
25 the first and most likely to be harmed in the event of a major

1 breach. They knew that Mrs. Palsgraf was within the circle of
2 where the explosives would hit.

3 Unlike the railroad company, Equifax had both general
4 and specific reasons to foresee the breach that ultimately
5 occurred. In fact, Equifax knew that its practices were
6 generally inadequate, that it had suffered multiple criminal
7 data intrusions in the past, and that there was a specific
8 publicly known vulnerability, and that there was a way to patch
9 readily available to fix it. But it didn't. The financial
10 institutions are the most foreseeable victims of this breach,
11 Your Honor, because of the way they use PII.

12 Now, we heard Equifax's response today summarized by
13 Ms. Sumner. Their primary response has been to say that it was
14 not the financial institutions' data that was compromised. But
15 isn't that like telling Mrs. *Palsgraf* that it wasn't her
16 package that exploded?

17 The issue is not whose package it was. The important
18 question is whether the financial institutions, or
19 Mrs. Palsgraf to continue the analogy, were in the zone of
20 danger. Who owns the package has no relevance to that
21 analysis. It's about foreseeability of harm. We have alleged
22 enough specific facts about the credit system to show we are in
23 that zone of danger.

24 The notion also that was brought up today and it's in
25 the briefs that this is limitless liability, that anyone can

1 sue, that even conjecture of relying on PII, that's not the
2 financial institutions.

3 Let me show you what I'm going to refer back to, a
4 chart that Mr. Guglielmo has already shown you. This is the
5 credit reporting system in America. This is where Equifax
6 stands in that system. But this is where the financial
7 institutions stand in that system as well. They are providers
8 of information. They are receivers of information. And the
9 consumers are third parties in that system of the exchange of
10 information.

11 Equifax doesn't even really deal with consumers
12 directly as it relates to this function. They deal with our
13 clients. That's clear. So the very notion that this is
14 limitless liability and we had no notion that there was
15 dynamite in that package, and let alone had any notion that
16 when it exploded it would hit Mrs. Palsgraf, that's not right.
17 That's not right. They know exactly what the harm would be to
18 our clients if they mishandled that PII, and they knew exactly
19 the volatility of it and the harm it could cause.

20 Equifax's other response has been to suggest that
21 they're not responsible because it was a criminal attack, but
22 cyber attacks are different than just normal criminal acts.
23 Cyber attacks on IT systems are constant in our society. They
24 occur multiple times every minute against every IT system in
25 America that has an internet connection.

1 This was a completely foreseeable, well-known
2 environment of risk. The notion that it's a one-off criminal
3 act is not accurate. It's an environment of risk that all
4 businesses live within. It doesn't do them any good to say
5 that there's an intervening cause because there's a criminal
6 act. The Georgia Supreme Court again in the *Wessner* case, and
7 I'm quoting, has indicated that the general rule that the
8 intervening criminal act of a third person will insulate a
9 Defendant from liability for an original act of negligence does
10 not apply when it is alleged that the Defendant had reason to
11 anticipate the criminal act.

12 We couldn't have more plausible allegations that this
13 Defendant had reason to anticipate the criminal act. I mean,
14 you couldn't have -- they themselves have said -- they in their
15 10K say we are regularly targets of cyber attacks. I can't
16 think of a better allegation than that to establish that this
17 Defendant actually had knowledge that there was going to be a
18 cyber attack. They have admitted it.

19 And, by the way, Your Honor, that rule enunciated by
20 the Supreme Court of Georgia in the *Wessner* case with regard to
21 third-party crime just mirrors the *Restatement of Torts* 302(b)
22 which also as indicates in that *Restatement* section that you do
23 have a responsibility to conduct yourself reasonably to avoid
24 known risks even when those known risks involve known potential
25 criminal acts.

1 And totally aside from that, in any event, the
2 foreseeability of criminal conduct is generally for a jury's
3 determination rather than summary adjudication by the Court.
4 So even at summary judgment we would be arguing that it's for
5 the jury to decide but especially at the motion to dismiss
6 stage.

7 Your Honor, that takes me to the *McConnell* decision;
8 and this ground has been fairly heavily plowed I will
9 acknowledge. And I want to thank Mr. Canfield for doing a good
10 job of it for us, and I want to echo everything that he
11 presented very well to the Court with regard to *McConnell III*.
12 But I want to also make one or two quick points myself on it.

13 *McConnell III* is the law of Georgia right now. No
14 one is questioning that. But it's not the law that controls
15 the decision of this Court. And that's because, as Judge
16 Totenberg found in *Arby's*, there are clear bases for
17 distinction to that case. And I am just going to list them
18 very quickly.

19 One is the foreseeability is so different here versus
20 what it was in *McConnell*. In *McConnell*, there were no
21 allegations of previous incidents. There were no known flaws.
22 There was no failure to implement reasonable security measures.
23 There was no investigation of how they were handling their
24 business and saying, hey, you have a problem. There were no
25 red flags. Nobody told them there was dynamite in the package.

1 Okay. If you want to use the *Palsgraf* analysis,
2 *McConnell* is the situation where it's a plain,
3 newspaper-wrapped package nobody knows has dynamite in it.
4 There's no foreseeability.

5 That's not this case. This case is a dynamite
6 transportation company. Everybody knows there's dynamite.
7 Dynamite is everywhere. It's going to explode if you're not
8 careful with it. That's our case. And they were told if
9 you're not careful it's going to explode, and it exploded.
10 They knew full well it was going to hit us. That's the major
11 distinction from the *McConnell* decision.

12 There's also no allegations in *McConnell* that the
13 employee accidentally e-mailed a sensitive spreadsheet. That
14 wasn't even part of the court's analysis. And, as I said, it
15 contrasts to what we have here where we have a known security
16 risk, patches being suggested and all those warnings being
17 ignored.

18 The second basis for distinction with *McConnell*, Your
19 Honor, is that the Defendant in *McConnell* wasn't Equifax. It
20 Department of Labor was the Defendant in *McConnell*. It didn't
21 specialize in data trafficking. It didn't make representations
22 about the security of its data practices like Equifax has.
23 Equifax made representations that data integrity is at the core
24 of their business. The volume and sensitivity and black market
25 value of the data Equifax was holding also makes it more likely

1 than the Georgia Department of Labor being hacked that they
2 would be hacked.

3 And then, finally, this does echo what Mr. Canfield
4 pointed out. *McConnell* didn't and couldn't overrule the
5 Georgia Supreme Court's investigation of the most general
6 principle of negligence law which is a general duty of care to
7 act reasonably at all times to alleviate foreseeable risk to
8 foreseeable victims. *McConnell* doesn't really even analyze
9 that general duty of care. That's a basis for distinction
10 that's important.

11 The *McConnell* court appears to be considering
12 affirmative duty of care in the context of managing PII
13 admittedly, but it's an affirmative duty of care trying to
14 establish that there's an obligation without looking to the
15 principles of foreseeability without invoking the general
16 principle of the common law that you have to act reasonably to
17 avoid foreseeable risk. That's not this case.

18 The Supreme Court is going to hear the *McConnell*
19 case, Your Honor. But one thing that I am very comfortable in
20 knowing, it's not going to change the fundamental tenet of the
21 common law of Georgia that you have to act reasonably at all
22 times to avoid foreseeable harm to others. I don't expect that
23 to change anytime soon. It's been in place for the history of
24 the common law.

25 Moving on to negligence per se, again, I'm going to

1 give a small shout out to Mr. Canfield for covering a lot of
2 what we want to say about the negligence per se claims. He
3 pointed out aptly that this Court already addressed the
4 applicability of negligence per se in the context of Section 5
5 of the FTC Act in the *Home Depot* case.

6 For all the reasons there as to why the financial
7 institutions are covered by Section 5 and protected by that
8 section of the statute, they still exist now. There's nothing
9 even about *McConnell* that changes that.

10 Our other basis for negligence per se, Your Honor,
11 very quickly is the Gramm-Leach-Bliley Act. Equifax's primary
12 argument with regard to this is that the safeguards rule isn't
13 specific enough to set a standard of care. And to support
14 that, they cite the *Wells Fargo v. Jenkins* case. But,
15 interestingly enough, that case didn't address the specificity
16 of the safeguards rule.

17 If you look at Footnote 3 of that case, Your Honor,
18 you will see that. The case only dealt with the statute
19 itself, very general statute. The specificity provided by the
20 safeguards rule or regulations that implemented the statute,
21 they're irrelevant here. That's what provides the specificity
22 of the Gramm-Leach-Bliley Act for our purposes and provides
23 protection to us.

24 It's that specificity that we are looking at in this
25 case. There's more than one, but I am going to highlight this

1 one. And that's the key requirement under the safeguards rule
2 that Equifax concedes is applicable to it, by the way, is that
3 Equifax developed an information security program appropriate
4 to its size and sophistication, the nature and scope of its
5 business and the sensitivity of the data it deals with.

6 Equifax failed grossly in its compliance with that
7 requirement. We are entitled to use that statute and use it
8 under a negligence per se concept.

9 THE COURT: Mr. Lynch?

10 MR. LYNCH: Yes.

11 THE COURT: Ten minutes.

12 MR. LYNCH: In conclusion, Your Honor, Equifax's
13 motion seems to suggest that it has no duty to act reasonably
14 to avoid foreseeable harm to others. That's an extremely novel
15 concept. They have done a lot of talking about novel concepts.
16 They have done a lot of talking about deference to
17 legislatures, about policy. But they are the ones that are
18 promoting a novel concept. And that novel concept would be the
19 company, the size of Equifax and with the sophistication of
20 Equifax would be absolved and made immune from the general
21 responsibility and duty that we all have as citizens of our
22 country which is to conduct ourselves reasonably to avoid
23 harming others with what we do when that harm is foreseeable
24 and known and the victims are foreseeable and known.

25 That's what would be a remarkable decision to come

1 out of this Court, not the simple acknowledgment of that
2 general tenet of the common law but the idea that we could
3 immunize a company. I would respectfully suggest, Your Honor,
4 to the extent this Court or any other court is thinking about
5 providing that type of immunity simply because of a novel fact
6 pattern that's something that should be left for the
7 legislature. That's a change of the common law that should be
8 left for the legislature.

9 The common law controls this case. There's nothing
10 novel about it, nothing novel about the application of the
11 common law here. The only thing that would be novel is to
12 immunize the Defendant.

13 If you don't have any other questions, Your Honor,
14 that's it for me.

15 THE COURT: Thank you, Mr. Lynch.

16 Ms. Sumner, you've got about 25 minutes of your time
17 left. If you are going to use anything close to that, I need
18 to take a break.

19 MS. SUMNER: Your Honor, I think it can be much
20 quicker than that amount of time.

21 THE COURT: All right.

22 MS. SUMNER: Thank you.

23 First, Your Honor, I'd like to start where I began my
24 argument, oh, I don't know, a couple of hours ago; and that is
25 to say this is not a payment card breach. There was a lot of

1 discussion by the financial institution Plaintiffs' counsel
2 about payment card issues. This is not a payment card breach.
3 There is one small component of this data breach that deals
4 with payment cards and their attempt to discuss some of the
5 potential alleged harms relating to cancelling or to dealing
6 with fraudulent transactions. That's a very tiny piece.

7 And really you could split this case apart in that
8 you've got that one subset that deals with about 200,000 cards,
9 but everything else goes into the big bucket of very attenuated
10 theory where they argue that because their customers' PII was
11 compromised that they are damaged. And that's where there
12 lacks specificity with respect to that.

13 They don't allege, frankly, even any particular
14 fraudulent transaction with respect to the payment cards and
15 they -- at most they say they might suffer fraudulent
16 transactions sometime down the road. And one of the paragraphs
17 listed on the demonstrative of paragraph 237 simply references
18 to one commentator who simply predicts that the financial
19 institutions may suffer harm. So they don't provide
20 specificity when it comes to satisfying the injury in fact
21 prong.

22 But with respect to traceability, they spoke to the
23 case *Resnick* and argued similarity. Your Honor, the facts are
24 not similar in *Resnick*. *Resnick* had two named Plaintiffs who
25 were individuals and who alleged with pretty specific

1 allegations that they personally suffered identity theft as a
2 result of the data breach in question. So, again, in that case
3 they discuss credit cards and bank accounts being opened in
4 their name as individuals.

5 This is not the *Resnick* case, except for the fact
6 that at the outset of the *Resnick* case there were individuals
7 who didn't specifically allege identity theft, and they were
8 dropped from the lawsuit. They were not able to continue on.
9 So the claims here by the financial institutions are more akin
10 to the Plaintiffs who were dropped out of the *Resnick* case as
11 opposed to the individuals who alleged very specific harm.

12 They also referenced a number of statements to
13 support what they argue were misrepresentations by Equifax.
14 But it's interesting if you look at the filings, Your Honor,
15 the statements that they started with it says, quoting Equifax,
16 "We are subject to numerous laws and regulations governing the
17 collection, protection and use of consumer credit and other
18 information and imposing sanctions for the misuse of such
19 information or unauthorized access to data." They haven't
20 alleged that that is a misrepresentation. It's a
21 representation that Equifax would be subject to numerous laws
22 and regulations. They haven't alleged that that is false. In
23 fact, that is true.

24 So there are several representations that they don't
25 even represent that they are false when made. For example, we

1 are regularly the target of attempted cyber and other security
2 threats was included in another filing. They don't argue that
3 that's false. So it has -- it does not -- those types of
4 statements will not support a negligent misrepresentation.

5 In addition, they don't have allegations regarding
6 any particular financial institution that relied on any
7 misrepresentations even if they were false statements, nor have
8 they alleged that Equifax knew that in making representations
9 such as those that financial institutions would rely on them in
10 handling their own consumer data.

11 I'll move next to the "but for" argument because "but
12 for" does not mean proximate cause which is the actual standard
13 here. And I believe that Governor Barnes referenced Professor
14 Prosser. I'd like to reference him too. There's one quote
15 that begins with, "The fatal trespass done by Eve was cause of
16 all our woe." If I had more time, I'd argue about whether Adam
17 should be in that, Your Honor. But I'll stick with -- I'll go
18 with the way it begins. And the professor goes on to say, "But
19 any attempt to impose responsibility upon such a basis would
20 result in infinite liability for all wrongful acts and would
21 set society on edge and fill the courts with endless
22 litigation."

23 "But for" doesn't work because it just keeps going
24 and adding on, and that's what they are arguing here, and that
25 is unworkable. What we need to be focused on is proximate

1 cause, and they haven't shown or alleged appropriate proximate
2 cause.

3 I'll spend a brief moment on *Palsgraf*. I'll start by
4 saying I absolutely agree the financial institutions aren't
5 Mrs. Palsgraf, and the case is quite different. I'm not sure I
6 followed all of the analogies to this scenario, but I will make
7 a couple of comments.

8 One, that involved a physical injury to
9 Mrs. Palsgraf; and she was a Plaintiff passenger of the
10 railroad. And really that case was about joint and several
11 liability. And the passenger with the fireworks and the train
12 employees helping that passenger who had the dynamite onto the
13 train, the argument was that there was negligence there. And
14 the court held that the passenger's negligence didn't absolve
15 the train employee's negligence.

16 And one of the things that the court relied on in
17 reading from *Palsgraf*: It must be remembered that the
18 Plaintiff was a passenger of the Defendant and entitled to have
19 the Defendant exercise the highest degree of care required of
20 common carriers.

21 The financial institutions aren't passengers of
22 Equifax. They don't fit within the *Palsgraf* mold. And even if
23 they try to stretch that case to apply it here and from a
24 danger-zone perspective, foreseeability is not enough. They
25 have to show direct injury, and there is no direct injury here

1 to the financial institutions.

2 Your Honor, if I could refer you back to the first
3 page. And I'm going to use the overhead here. This was the
4 diagram that they relied upon in arguing about the credit
5 reporting system. And, in fact, I believe this diagram
6 supports our argument because it proves the point that the
7 financial institutions are derivative. The consumers are the
8 ones where the information is being impacted according to this
9 diagram, not the financial institutions.

10 And there's no allegation that any of the information
11 represented on those arrows, if you look at the credit reports
12 going from the CRAs to the lenders and you look at the trade
13 line history going to the CRAs from the lenders, none of that
14 was involved in the data breach because, as I mentioned before,
15 the credit reporting database was not impacted. So that
16 information was not a part of this at all.

17 And even if we were to limit this theory to this
18 credit reporting ecosystem, here's how this theory would play
19 out. Anyone in that bucket where it says national credit
20 reporting agency or credit reporting agency -- and, of course,
21 there are many credit reporting agencies. There are several
22 very large ones, but there are many in that bucket. And then
23 if you look at the bucket that says lender user data furnisher
24 where there are thousands and thousands in that bucket and you
25 see as demonstrated by those arrows if information was

1 compromised that involved credit reports or trade history, then
2 at that point either the lenders or the CRAs could be held
3 liable.

4 So, in fact, what they are suggesting in their theory
5 of liability is that if any credit reporting agency was
6 breached and any consumer PII was put at risk then every
7 financial institution would have the right to sue and recover
8 from that credit reporting agency. But it flips the other way
9 because it would also mean that if any financial institution
10 had a data breach involving consumer PII upon which the credit
11 reporting agencies relied then they're damaged.

12 I don't think that that is what the named Plaintiffs
13 intended. And I suspect that their brethren would not be very
14 pleased if they had a data breach and the theory was used to
15 say now you are beholden to everyone in that ecosystem who uses
16 that consumer information. Because, of course, consumers use
17 different banks; so there may be a number of banks who use and
18 rely on the same consumer PII.

19 It gets very confusing fast, and it gets very remote
20 fast. But the arguments that they are making and the theory is
21 boundless here. And, Your Honor, it's not one that they can
22 cure. And so we ask that this -- and we suggest to Your Honor
23 that this theory cannot survive, and we request that you
24 dismiss the financial institutions Plaintiffs' complaint with
25 prejudice.

1 Thank you, Your Honor.

2 THE COURT: Well, it has been a long day; but the
3 oral argument has been useful to me. And I hope it will result
4 in a better decision than might have been given otherwise. So
5 thank you very much. I'll get out a written order as soon as I
6 can. And that concludes this hearing.

7 Thank you very much. Court's in recess until further
8 order.

9 (Proceedings adjourned at 4:13 p.m.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 179, are a true and correct copy of the proceedings in the case aforesaid.

This the 24th day of May, 2019.

/s/ Susan C. Baker

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court